TRANSCRIPT OF

CLARKSBURG VIOLATION HEARING

CLARKSBURG TOWN CENTER

SITE PLAN REVIEW NO. 8-98001, 8-98001 B, AND 8-02014

BEFORE THE

MONTGOMERY COUNTY PLANNING BOARD

APRIL 14, 2005

COMMISSIONERS PRESENT:

DERICK P. BERLAGE, CHAIRMAN
WENDY C. PERDUE, VICE CHAIR

ALLISON BRYANT

JOHN ROBINSON

MEREDITH WELLINGTON

- 1 CHAIRMAN BERLAGE: Any opposed. That's unanimous.
- 2 Last item of business for the day is number four, a
- 3 threshold hearing concerning alleged building height
- 4 violations concerning the indicated site plans for the
- 5 Clarksburg Town Center. Let me make a few procedural
- 6 comments since we don't do this type of hearing that often.
- 7 This is a hearing and then it will be followed by a
- 8 discussion by the board at which the board will determine
- 9 whether it believes that there is or is not a violation of
- 10 an existing site plan. If the board concludes that there is
- 11 a violation, then at a future hearing, at a future
- 12 deliberation we will discuss what the remedial action might
- 13 be. So today's discussion is directed at whether there is
- 14 or is not a violation and not necessarily at issues of
- 15 remediation or mitigation, or other types of enforcement
- 16 remedies. We will begin by getting the testimony of the
- 17 complainant.
- 18 The complaint was filed by the Clarksburg Town Center
- 19 Advisory Committee and we will receive up to ten minutes of
- 20 testimony from the complainant, then we will get a Staff
- 21 presentation of up to another ten minutes. We will then
- 22 receive testimony from Newland Communities, Buzutto Homes
- 23 and Craft Star, who are the three entities against whom the
- 24 complaint is directed, either expressly or implicitly, and
- 25 they will each have up to ten minutes to address the board.

- 1 Finally we will take testimony from any other interested
- 2 persons, that time limit will be the normal time limit of
- 3 three minutes for an individual or five minutes for someone
- 4 representing an organisation and then the board will
- 5 deliberate the matter. So, we begin with the testimony of
- 6 the complainant, the Clarksburg Town Center Advisory
- 7 Committee. Welcome.
- 8 MS. PRESLEY: Good afternoon and thank you to the board
- 9 for hearing us today. Apparently the two don't know that we
- 10 are up yet. I am Amy Presley. I have Kim Shiley and also
- 11 Carol Smith with me today. Together we serve as the co-
- 12 chairs of a larger Clarksburg Town Center Advisory
- 13 Committee. As tax paying citizens of Montgomery County we
- 14 put our faith in the established planning and development
- 15 processes, and this board to ensure appropriate development
- 16 within the County. As residents of Clarksburg Town Center
- 17 we put our faith in the validity of the specific planning
- 18 and development documentation approved by this board for the
- 19 Town Center. We also put our faith in the board's
- 20 willingness to enforce the requirements set forth in that
- 21 documentation. The board approved documents for Clarksburg
- 22 Town Center tell a clear story. They show specifically when
- 23 and why the height restrictions for Clarksburg Centre came
- 24 into being and we will show you today what we believe is
- 25 unarguable evidence relative to the height restrictions

- l contained in that documentation. So with that if we could
- 2 have a presentation.
- 3 CHAIRMAN BERLAGE: Are we making any progress on the
- 4 technical difficulties? It's uploading, downloading, side
- 5 loading? Okay go ahead Ms Presley.
- 6 MS PRESLEY: We just want to start out going through a
- 7 document chronology for the Clarksburg Town Center. We
- 8 begin with the master plan and heights town special study
- 9 area, which was approved in June 1994. That took several
- 10 years of planning and involved many people from the
- 11 community based planning as well as the civic associations
- 12 including Clarksburg Civic Association and many others in
- 13 the region. From there they proceeded to development
- 14 application, which was submitted by the developer in
- 15 November 1994 and from that point to a project plan number
- 16 994004, which was approved May 1995 and then we proceeded to
- 17 a preliminary plan 195042, which was approved September
- 18 1995, and the initial site plan Phase One 898001, which was
- 19 approved January 1998. It is important to note with this
- 20 type of documentation we have noted and studied for the
- 21 past, really for the past year that these documents are
- 22 expected to be submitted in increasing order of specificity
- 23 and detail, from the master plan on through to the site
- 24 plan, with the most detail expected in the site plan. We

- 1 have had that information confirmed to us by Staff and also
- 2 by Chairman Berlarge.
- 3 The first document we looked at was the master plan
- 4 and it was clear to us that within the ten key policies
- 5 guiding the master plan, policy number one relative to town
- 6 scale of development, this plan includes the Clarksburg
- 7 historic district as a key component of an expanded Town
- 8 Center. Policy number six on page 26, the plan proposes a
- 9 transit oriented multi-use Town Center, which is compatible
- 10 with the scale and character of the Clarksburg historic
- 11 district, and interesting to note here that it considers the
- 12 entire Town Center to be compatible with the district, it
- 13 does not just segregate the buffer zone. Again, in policy
- 14 six, the plan continues the historic function of Clarksburg
- 15 as a centre of community life. It will be part of an
- 16 expanded Town Center. And then this especially hit home for
- 17 us, assuring compatibility of future development with the
- .18 historic district has been a guiding principle of the
- 19 planning process. We find that that, those principles made
- 20 their way and became evident at first in the developer's own
- 21 application, which is Exhibit A, if you could do this Carol,
- 22 which was submitted by Steven Klebenhoff, managing general
- 23 partner of the Clarksburg Land Associates Limited
- 24 partnership and Piedmont Land Associates Limited
- 25 partnership, trading at that time as Clarksburg Town Center

- l Venture. The attorney of record, Linowes and Blocker, and
- 2 the proposed building height in this application lists a
- 3 maximum of 50ft.
- 4 From that we proceeded onto the project plan
- 5 documentation and the project plan set, as submitted by
- 6 Clarksburg Town Venture, as a basis for approval of the
- 7 project plan, that would be Exhibit B, shows maximum heights
- 8 of single-family and townhome of 35ft, multi-family 45ft.
- 9 The attorney of record again, Linowes and Blocker. The
- 10 project plan approval, page 8 finding number 1, the planning
- 11 board finds that the project plan as condition meets all of
- 12 the purposes and requirements of the RMX2 zone. A summary
- 13 follows that compares the development standard shown with
- 14 the development standards required in the RMX2 zone, and
- 15 it's important to note here that the development standards
- 16 proposed or shown by the developer for CTC were the
- 17 standards upon which the Staff based its opinion and the
- 18 board based its approval. On page 9 finding number 1, lists
- 19 that the data table shows what is required versus what is
- 20 allowed in the RMX2 zone, versus what is proposed for the
- 21 Clarksburg Town Center and what we see here in the approved
- 22 project plan is a data table that agrees with both the
- 23 developer's application and the project plan drawing set,
- 24 and that's distinctly calls out four stories 50ft for
- 25 commercial, four stories 45ft for residential.

Now we've had question to our group as to where this 1 came from. We've had Staff Report asking us or saying that 2 3 they didn't know where these heights originated from, as there is no specific height required in RMX2 zone. We agree 4 with that but those things were obviously taken into 5 consideration by Staff and by the groups that prepared the 6 project plan prior to approval by the board. So this is the 7 first that we find in the approved documentation by the 8 board that there is a specific height. Also in the 9 10 preliminary plan number 195042, the submission to, excuse me 11 the submission by Clarksburg Town Center again, that's Exhibit B, again the developer defines the maximum height as 12 single family and town homes 35ft, multi-family 45ft, and 13 attorney of record for that Linowes and Blocker. 14 preliminary plan, page 1, it states that the underlying 15 development authority, project plan number 94004 was 16 17 approved by the planning board on May 11 after two prior 18 planning board meetings, the record for preliminary plan 19 195042 specifically includes the records from those prior 20 hearings. The approval is subject to the following conditions, and what we noted here is that the board 21 obviously recognized the project plan as the underlying 22 development authority. Page number 6, condition 14 states 23 that both the preliminary plan and the project plan are 24 expressly tied together interdependent upon each other and 25

- 1 specifically that expressly tied to and interdependent upon
- 2 the continued validity of project plan number 94004. Each
- 3 term, condition and requirement set forth in the preliminary
- 4 plan and project plan are determined by the planning board
- 5 to be essential components of the approved plans and are
- 6 therefore not automatically severable. So we have seen just
- 7 from this point to the preliminary plan that there is a
- 8 definite reason for an inclusion of the heights, that it's
- 9 been submitted by the developer, it's been considered by the
- 10 Staff, it's been approved by the board, and here it's
- 11 written in as part of the condition 14, that none of these
- 12 things are separable.
- On the site plan review 898001 January 16, the site
- 14 plan review submitted to the board noted adjustments to the
- 15 project plan approval but those adjustments did not mention
- 16 anything regarding height. In fact, conformance to the
- 17 master plan again was stated, page 26, the proposed site
- 18 plan will establish a strong identity with a traditional
- 19 town character as called for in the master plan. So we see
- 20 even with the site plan review submittal there is still an
- 21 acknowledgement that this is in keeping with the need to
- 22 preserve the character of the historic district. On the
- 23 approved site plan, page 2, Montgomery County Planning Board
- 24 finds: 1) the site plan is consistent with the approved
- 25 development plan or a project plan for the optional method

- 1 for development; 4) each structure in use is compatible with
- 2 other uses and other site plans and with existing and
- 3 proposed adjacent development. Again, not just the buffer
- 4 area around one historic district, but the entire
- 5 development. The site plan set that was submitted, Exhibit
- 6 D, by Clarksburg Town Center Venture at that time again,
- 7 still showed a maximum height definition of 35ft for single-
- 8 family and townhomes and multi-family 45ft, and again the
- 9 attorney of record is Linowes and Blocker.
- 10 What we are showing here on the screen is one of the
- 11 streets, this is actually Sugarview Drive and it shows the
- 12 typical character of what is obviously in keeping with a
- 13 small town. And then these are some views of buildings in
- 14 question that we know for a fact exceed the 45ft height
- 15 limit. We have been told at various times measurements
- 16 ranging from 57ft and then backing down to the 53.8 and
- 17 50.10, we don't know to date if there actually has been a
- 18 surveyor who has gone out and given an accurate measurement,
- 19 but we have this information from Staff, so we will go with
- 20 these measurements. These are just continuing, Tim if you
- 21 could flip through these pretty quickly. Just other
- 22 pictures showing what we consider not to be compatibility
- 23 with the development, but again our point here, this is a
- 24 view coming in from the Stringtown Road entrance which is
- 25 intended to be a major entrance and clearly the buildings

- 1 are hovering over, they are not what we consider to be
- 2 compatible, but again we are not basing this on our opinion
- 3 based on visual only, our concern here is that there is a
- 4 specific height limitation and the height has been, in our
- 5 opinion, has been violated. So we tried to investigate how
- 6 this happened, I am nearly running out of time so I will try
- 7 and speak quickly, but in the site plan review of January
- 8 (overspeaking).
- 9 CHAIRMAN BERLAGE: I will give you an additional two
- 10 minutes and I will give the same additional time to the
- 11 subjects of the complaint. Go ahead.
- MS PRESLEY: Thank you. What we see first in the site
- 13 plan review that that submission had questionable aspects to
- 14 it, the first being that there was a revised data table
- 15 submitted by Staff with the review documentation, that's
- 16 noted on page 32. Instead of using the approved data table
- 17 that was a part of the project plan, we noted that on that
- 18 data table which was somehow reconstructed that it shows
- 19 four stories as a generic title in the proposed column. It
- 20 omits the specific definition that was contained in the
- 21 approved plan and the preliminary plan. However, it is
- 22 important to note again that even though this merely
- 23 generisized or made ambiguous that term, the site plan
- 24 submission documents, the set of plans from the developer

- and stamped by the staff and reviewed by the board still
- 2 show 45ft and 35ft.
- 3 So in our opinion the omission of detail does not
- 4 relieve the developer from building those four stories in
- 5 accordance with the approved project plan and preliminary
- 6 plans. On page 7 of the site plan, there is a condition
- 7 number 38, the applicant may propose compatible changes to
- 8 the units proposed as market conditions may change provided
- 9 that fundamental findings of the planning board remain
- 10 intact and in order to meet the project plan and site plan
- 11 findings, consideration shall be given to building type and
- 12 location, open space, recreation and pedestrian and
- 13 vehicular circulation, adequacy of parking, etc. for Staff
- 14 review and approval. We have heard this particular
- 15 condition quoted to us by several people stating that this
- 16 in some way would give Staff licence to change those heights
- 17 of the building, or to allow for a developer to change those
- 18 heights of the building, we find that this doesn't give
- 19 staff the authority to reduce restrictions without due
- 20 process which we believe would have been an amendment
- 21 hearing.
- 22 Again, what we find is that there is no documentation
- 23 on file at all with M-NCPPC, we have researched everything
- 24 we can, regarding the reduction of height restrictions as
- 25 contained in the approved project plan and preliminary plan.

- 1 There is no record of an amendment hearing regarding height
- 2 restrictions and there is no record of even a minor
- 3 amendment by Staff to alter height restrictions. So based
- 4 on what we firmly believe is unarguable evidence contained
- 5 within the board approved project plan, preliminary plan and
- 6 site plan, and then actual drawing sets submitted by the
- 7 developer showing a 45ft maximum height for residential
- 8 buildings, we expect a ruling of non-compliance, and we are
- 9 representing not just the CTCAC today, we are representing,
- 10 we can put into the record, we have close to 200 signatures
- 11 of residents who are in agreement with us on every point.
- 12 CHAIRMAN BERLAGE: Okay, and now your additional time
- 13 is up, so thank you very much. I think we should go ahead
- 14 and get the staff position and the subject of the complaint
- 15 but I imagine there may be questions for you Ms. Presley so
- 16 I know you will stay here, you can step back but we will
- 17 probably bring you back to the table at some point here. So
- 18 let's get the Staff Report next.
- 19 MS. WITTHANS (STAFF): Good afternoon. For the record
- 20 I am Wynn Witthans of the Development Review Division. I am
- 21 bringing before you item number 4, and I enter this report
- 22 into the record for us today. Today we are recommending
- 23 that the Planning Board find that the buildings heights on
- 24 the subject structures do comply with the site plan
- 25 approvals, and I think our argument has been well documented

- 1 within our report and I would like to just go over a few of
- 2 those points today if I could. I have to say I don't
- 3 disagree with a lot of what the citizens have said, they
- 4 have done a lot of analysis, but what I disagree with is
- 5 where they have ended up and why they came to the
- 6 conclusions that they did.
- 7 But I thought we had a video of the site and we would
- 8 like to just show that because we had some particular issues
- 9 we wanted to talk about too. So if I could trouble Ms.
- 10 Joyce to get that started. While she is working on that, I
- 11 just would like to point out to the Planning Board the
- 12 location of the five buildings in question. This is the
- 13 Clarksburg Town Center site plan, series of site plans, this
- 14 is Clarksburg Road on the north western side, Stringtown
- 15 Road on the south, to the east 355 is along this bottom side
- 16 of the page and A305, the newly constructed and under
- 17 construction A305 is up here. The site, so far the site has
- 18 been built in two phases. The first phase includes the area
- 19 down here and this, from Clarksburg Square Road we are here
- 20 over to Stringtown Road, and that was Phase One. Phase Two,
- 2! which was approved in 2002 is the remainder of this uphill
- 22 portion of this site. We will, soon you will see an
- 23 amendment for a portion of Phase One and you will see the
- 24 future Phase Three on here. This also includes a mandatory
- 25 referral site that you have looked at which is the Park

- l School site up here. The five buildings are the two over
- 2 two buildings, on opposite sides of Clarksburg Square Road,
- 3 what we consider the main street. Here is another two over
- 4 two buildings that is opposite the Town Square.
- 5 CHAIRMAN BERLAGE: Let me just say if either the
- 6 complainant or the subjects of the complaint, want to stand
- 7 over there so they can see what we are seeing as we see it,
- 8 feel free to stand against the windows.
- 9 MS. WITTHANS (STAFF): Okay, and then the condominium
- 10 buildings are here. Is that playing all the time? It's not
- 11 at the beginning however and maybe we could reverse that to
- 12 go back. One point the citizens made was about the historic
- 13 district, and of course that was a key element to the master
- 14 plan and the project plan review, and in the project plan
- 15 there was, excuse me, in the master plan there is set up
- 16 requirements for compatibility to the historic district, and
- 17 those are itemized in the, I think the first attachment,
- 18 well not the first, the Community-Based Planning attachment,
- 19 as well as one of the developer's attachments, and there is
- 20 a drawing in there that shows the sketch from the master
- 21 plan where the buffer area is pretty much described as being
- 22 down here right at the edge of the Town Center, excuse me
- 23 the historic district, and does not run into these areas up
- 24 here as indicated by the applicants.

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Okay, this is starting off, and there is, I also
1
    wanted to point out the relationship between the historic
2
    district area and the buildings over here, so where I am
3
    starting off today I am down in the lower area and we are
4
    looking at the street, and I think our pictures are pretty
5
    much the same as the citizens. Okay. This is along the
6
    main street or Clarksburg Square Road and we see many of the
7
    houses are in down here, landscaping in, you see a variety
8
    of units in here all pretty close relationship. Let's pause
9
    right here if we could. And we are looking across at what
10
    would be the future town square and retail area and the two
11
    buildings you see here are the two over two units. Over
12
    here, this is not the tall, these are not the condominium
13
    buildings that are three and four stories, but these are
14
    other buildings, and that's a tree preserver over there,
15
    areas where trees are saved here and up here again. Okay,
16
    continue please. This is an area of the highest topography
17
    within this site as well. Now we are up in phase, the
.18
    uphill section and let's look, and then stop right here
19
    please. Where we are right now, is near the stormwater
20
    management pound. We are looking at three-story townhouses
21
    here and beyond it we are looking at three-story multi-
22
    family buildings. So these are the three-story buildings
23
    here. I think the sketch that or the picture we saw earlier
24
    may have indicated they were all four-story, but I just want
25
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- 1 to make it very clear that this is a three-story building
- 2 here. The reason it's taller is it's on a higher piece of
- 3 ground. Okay, let's continue. And that's another three-
- 4 story building and stop here, and that's the four- story
- 5 building. Okay and continue please. Many of the buildings
- 6 are three stories. As you can see they are very tall
- 7 buildings. Here we are up on the street next to the three-
- 8 story buildings and four-story buildings and let's pause
- 9 right here if we could. I would just like to point out the
- 10 features of the buildings as we look at them.
- They have a combination of building materials, they
- 12 have stone, they have siding, they have bay windows, they
- 13 have little porches here, they have a variety of rooflines.
- 14 Now one thing we did when we first were asked if these
- 15 buildings were out of, in non-conformance with the site
- 16 plan, we went over the buildings and made very sure that
- 17 they were four stories. You can count them and you can see
- 18 that this is 1, 2, 3, 4, 5, however this space is considered
- 19 a mezzanine. It is less than one third of the floor area
- 20 below it, so that may have caused some of the initial
- 21 confusion, but this is a.
- 22 COMMISSIONER WELLINGTON: What is a mezzanine? I am
- 23 sorry.
- 24 MS. WITTHANS (STAFF): Mezzanine, it's like a loft
- 25 space, it's like a small room that's at the upper lever,

- 1 however it's allowable as a story, it is not counted as a
- 2 story, and thus is allowable in this building.
- 3 COMMISSIONER ROBINSON: So under your theory we could
- 4 have four stories each of which have a 9ft mezzanine in it,
- 5 for a total of 19, 16, or 17ft a story.
- 6 MS. WITTHANS (STAFF): Yeah, I suppose you could.
- 7 COMMISSIONER ROBINSON: Thank you.
 - 8 MS. WITTHANS (STAFF): You can see the buildings in
 - 9 context with their surroundings here. Here we have the
- 10 well-landscaped and detailed grounds. The buildings are set
- 11 a great deal off the street and there is green space and
- 12 landscaping that act as a transition in between. The
- 13 developer has put in some screening for parking in that
- 14 scene right there. Coming down to where the two over twos
- 15 are we see three-story townhouses under construction and
- 16 here is under construction a two over two and let's hold
- 17 right there. Thank you, and this is the two over two
- 18 building. This again is a variety of building materials
- 19 that help break up the bulk and mass of the building. It
- 20 has brick, it is all sides finished, it has brick, it has
- 21 some siding, it has different stone in here, bay windows, on
- 22 and on. Okay, and let's continue. I think that's probably
- 23 about it though. This is looking down to the open space and
- 24 the future retail area. These are the manor homes that were
- 25 approved last month, or the month before, and then just

- 1 another view of those. And here we are looking and you can
- 2 see again, I just wanted to point out also how tall that
- 3 hill is, so the units are perched up a little bit more.
- 4 CHAIRMAN BERLAGE: Do you have more?
- 5 MS. WITTHANS (STAFF): I do, I must have hidden them
- 6 away (inaudible). So I gave you a hand out because I think
- 7 the citizens were concerned as they went into the drawings
- 8 they found a chart that had some different information than
- 9 what was approved. What I want to say is that the site plan
- 10 has gone a long way to conform to not only the project plan
- 11 but also the master plan and also the requirements of the
- 12 RMX2 zone. As you know the RMX2 zone has no height limit to
- 13 it. The master plan says that apartment buildings should be
- 14 four stories. I presume that is, we have always understood
- 15 that to be multi-family buildings. All of these buildings
- 16 are multi-family buildings before us today. The project
- 17 plan in its chart that is in the Staff Report, listed as
- 18 Attachment I, I believe, states that the required height is
- 19 four stories, however the project plan goes on to state that
- 20 the proposed height was to be four stories or 45 ft. That,
- 21 and again on page 34 of the project plan Staff Report, are
- 22 the only times that the project plan really refers to
- 23 building height, size, configuration. On page 34 of the
- 24 project plan it says that the, it's under point number 9, it
- 25 says that the buildings should be oriented to the street.

- 1 And then it goes on to say, it refers to the drawings, it
- 2 refers to the sample blocks, and that is as illustrative as
- 3 they get in terms of detailing the buildings.
- 4 The buildings are not heavily detailed at project plan
- 5 and indeed one cannot pull a building permit from a project
- 6 plan but instead as detailed in the Staff Report on page 9
- 7 of our submittal that you can only receive a building permit
- 8 with the site plan per the DPS and Section 8-26 Code. So,
- 9 again we contend that the project plan required four stories
- 10 and the site plan provided four stories and four stories was
- 11 intended. What's changed from 1993 and 1994 when these
- 12 plans were approved is that development standards have
- 13 changed. Buildings are, it is very difficult to do a four-
- 14 story building in 45ft, and I say difficult, but it's just
- 15 not today's development standards. We have taller ceiling
- 16 heights, we have other requirement to have a fire escape
- 17 window out of the roof if there is to be a liveable space up
- 18 in the attic, per one of the applicant's letters. We are
- 19 also, let's see, and as we live in more dense communities we
- 20 need more liveable space internally to our units. The
- 21 project plan allowed for that flexibility and the site plan,
- 22 as it was approved for Phase One, Phase Two, and then again
- 23 with the manor homes at each time said that the height
- 24 required out here was four stories and the projects that we
- 25 have brought to you before are all four stories. Staff has

- 1 made no amendments to the height of the buildings. What has
- 2 happened that the citizens have found out is that in the
- 3 numerous amendments to the project there have been, what we
- 4 need to do is to reconcile the charts that are on the back
- 5 pages of our signature set better with our approvals, and I
- 6 would just like to explain a little bit of the back end of
- 7 the process.
- 8 CHAIRMAN BERLAGE: Now, did the clock stop, or did she
- 9 run out of time or what happened? Two more minutes, that's
- 10 it.
- MS. WITTHANS (STAFF): Thank you. Let's see. The
- 12 chart that the citizens are referring to is on page 2 here.
- 13 That appeared on the back page of the signature set. We
- 14 missed it on the first time, and however..
- 15 COMMISSIONER WELLINGTON: I am sorry, this is
- 16 important, where are you exactly?
- MS. WITTHANS (STAFF): I am on the handout that I gave
- 18 you as I began speaking, and the second page shows a chart
- 19 that was in the back of the signature set.
- 20 COMMISSIONER WELLINGTON: No I don't think I have that,
- 21 just a minute.
- 22 CHAIRMAN BERLAGE: This is the document that has a site
- 23 plan on the front.
- 24 MS. WITTHANS: The site plan on the front shows the
- 25 number of amendments that we've made to the project,

- 1 suggesting them for different reasons. But I would like to
- 2 (overspeaking)
- 3 COMMISSIONER WELLINGTON: What is this second page,
- 4 just where did it come from?
- 5 MS. WITTHANS (STAFF): The second page is a chart that
- 6 was found on the last page of the signature set.
- 7 COMMISSIONER WELLINGTON: The final signed documents of
- 8 all parties.
- 9 MS. WITTHANS: Correct, of the first site plan. Since
- 10 that site plan back in 1998 we have had amendments A, B, C,
- 11 D, E, F and G in Phase One. In Phase Two we are up to
- 12 amendment B, we have had amendments A and B. Many of the
- 13 changes have been to modify the types of buildings. That
- 14 was the intent of Condition 38 in the original site plan
- 15 approval where it said that Staff can make minor changes, as
- 16 we do from time to time when we are able to, to not have to
- 17 come back to the planning board when we change from
- 18 townhouses that look like this to townhouses to look like
- 19 that. We have never changed the height of the building. I
- 20 would like to direct your attention to the next page and
- 21 what that does show in that signature set, was that the
- 22 stories of the buildings were clearly identified for any
- 23 building that was four stories, and likewise it has been on
- 24 all the subsequent site plans.

- 1 CHAIRMAN BERLAGE: I am sure that the developers will
- 2 bring out some of your points too but your additional time
- 3 is now up.
- 4 VICE CHAIR PERDUE: Can I just get a clarification?
- 5 Right, this one was on the back and the third page which
- 6 shows things listed as four stories, that was on the, where
- 7 was that from?
- 8 MS. WITTHANS (STAFF): That was from the same set of
- 9 documents.
- 10 VICE CHAIR PERDUE: Okay so,
- .11 COMMISSIONER WELLINGTON: The final site plan.
- MS. WITTHANS (STAFF): The first site plan and on that
- 13 site plan we had an opinion that said four stories, we had a
- 14 Staff Report that said four stories, we had drawings that
- 15 said four stories and somehow this chart (overspeaking).
- 16 COMMISSIONER WELLINGTON: And did you also have a
- 17 finding that it would conform to the project plan?
- MS. WITTHANS (STAFF): We did. It was consistent,
- 19 consistent with the project plan, with the language.
- 20 COMMISSIONER ROBINSON: Was there a finding on a
- 21 specific height? Was there a finding specifically on the
- 22 issue of height?
- MS. WITTHANS (STAFF): In what aspect?
- 24 COMMISSIONER ROBINSON: That it conforms with the
- 25 project plan.

- 1 MS. WITTHANS (STAFF): I can review that.
- 2 CHAIRMAN BERLAGE: Well, if you could look into that
- 3 and give us an answer later.
- 4 COMMISSIONER ROBINSON: Was there a specific finding
- 5 that the height conformed with the project plan in feet?
- 6 CHAIRMAN BERLAGE: She will look at that and she will
- 7 give us an answer later. Okay, Tim Dugan, Todd Brown and
- 8 Barbara Sears, you are the first three speakers, you are
- 9 representing the alleged violators and you will each have
- 10 twelve minutes if you need it.
- 11 MR. BROWN: Thank you Mr. Chairman. For the record my
- 12 name is Todd Brown, I am an attorney with Linowes and
- 13 Blocker, and I am here speaking this afternoon representing
- 14 Newland Communities who is the master developer of the
- 15 Clarksburg Town Center. When this issue was brought to our
- 16 attention we took it very seriously and we went back and we
- 17 looked at the master plan in detail, at the project plan
- 18 approvals in detail, and at the numerous site plan approvals
- 19 as Wynn Witthans has just said, including the amendments in
- 20 detail. We have also provided the board with our thoughts
- 21 on this matter in a letter that has been included in your
- 22 packet. In this case we have a situation where the
- 23 Community-Based Planning division of this agency who is
- 24 responsible for drafting the master plan, that brings it to
- 25 your attention and takes it to the Council, has concluded

- 1 that four-story apartments and two over two condominiums are
- 2 consistent with the master plan and that they implement the
- 3 master plan vision. That's your community based planning
- 4 division conclusion. Your development review division,
- 5 which processes your site plan applications and your project
- 6 plan applications, as Ms. Wynn Witthans has just stated, has
- 7 concluded that all of the buildings heights comply with all
- 8 the conditions and all of the development standards that are
- 9 applicable in this case. We absolutely endorse those
- 10 conclusions, we think that they are the correct conclusions.
- If you go into this master plan you will not see any height
- 12 limitation other than the statement about apartments, four
- 13 stories except within walking distance of the transit centre
- 14 where up to eight stories is permitted. So there is
- 15 absolutely no limit applicable in the master plan to these
- 16 buildings because they are located far beyond the buffer
- 17 area, which we included in the map, it's from the master
- 18 plan, in our materials, that would restrict these buildings
- 19 to anything less than four stories, from the master plan
- 20 perspective and your Community-Based Planning division has
- 21 agreed with that.
- The compatibility guidelines, this figure 21 that we
- 23 identified, is very specific, and when you look at the
- 24 policy guidelines that are in the master plan, there are
- 25 general statements about the importance of being compatible

- l with a historic district. That is in there to be sure but
- 2 the master plan itself then goes on and gives very specific
- 3 recommendations about how to ensure that compatibility and
- 4 the specific recommendations deal with figure 21, which
- 5 provides an area around the historic district where building
- 6 heights are limited, again in numbers of stories not in
- 7 numbers of feet. These buildings that are at issue in this
- 8 case are considerably beyond that buffer area. In terms of
- 9 the project plan and the site plan as Staff has just
- 10 indicated, the determining factor for the site plan which
- 11 says four stories is, is it consistent with the project
- 12 plan? That's what the code requires. Is it consistent with
- 13 the project plan? In our view it is consistent, because in
- 14 our view the project plan required a four-story maximum
- 15 building and the site plan required a four-story building.
- 16 COMMISSIONER ROBINSON: That would be true even if each
- 17 story turned out to be 25ft because of commercial need and
- .18 architectural design?
- MR. BROWN: Well I think what's interesting, I heard
- 20 your point Commissioner on the loft condition but I think
- 21 that what occurs is that that elevation during site plan
- 22 review would come to this board, and this board would make a
- 23 determination as to whether if that building that might have
- 24 loft built upon loft built upon loft, was compatible with
- 25 the historic district. That did not occur in this case.

- COMMISSIONER ROBINSON: But the project plan said 45ft
- 2 so then suddenly you can end up with a building that's 80ft
- 3 high and it's consistent with the project plan?
- 4 MR. BROWN: No, I disagree with that Commissioner
- 5 Robinson, I don't think that's the case at all. I think the
- 6 finding of compatibility with the project plan is made by
- 7 this board when it considers a site plan, and a site plan, I
- 8 would suggest, that came in here showing a building that was
- 9 75ft high but four stories.
- 10 COMMISSIONER ROBINSON: But by your own argument, it
- 11 didn't say anything about height, it just said four stories.
- MR. BROWN: But the compatibility requirements still
- 13 has to be (overspeaking).
- 14 COMMISSIONER ROBINSON: The compatibility standard
- 15 addressed the actual number of feet per story or the number
- 16 of feet on the height of the building.
- 17 MR. BROWN: No, but the board was presented with
- 18 elevations of these buildings when they came in for site
- 19 plan.
- 20 COMMISSIONER ROBINSON: And we were presented with the
- 21 elevations, and so that tells us by looking at the
- 22 elevations whether it's 45ft total, now X feet per floor, or
- 23 whether it's 56ft or 60ft.

- MR. BROWN: I cannot say whether the elevations
- 2 specifically had height limits on it but certainly this
- 3 (overspeaking).
- 4 COMMISSIONER ROBINSON: Well, I think this is a pretty
- 5 critical fact because if it didn't say what the actual
- 6 height limitations are.
- 7 MR. BROWN: With all due respect I would disagree
- 8 because (overspeaking).
- 9 COMMISSIONER ROBINSON: I am sure you would but you had
- 10 better be prepared to answer that argument, think about it
- 11 some more.
- 12 MR BROWN: Because the limit that's required is four
- 13 stories. If a building is four stories (overspeaking).
- 14 COMMISSIONER ROBINSON: Even though it gets to be 80ft
- 15 on the site?
- 16 MR. BROWN: If a building is four stories tall, it
- 17 meets that requirement. There still must be a finding of
- 18 compatibility by this board, and the board makes that
- 19 finding based upon the materials that are presented to it.
- 20 VICE CHAIR PERDUE: Because in the elevation if it had
- 21 four stories plus four mezzanines, the board might be able
- 22 to count the mezzanines and you see, just as we saw in that,
- 23 as Wynn pointed out, count the windows, it looks like that's
- 24 five, here's why it's not five, an elevation that showed
- 25 eight sets of windows on what was described as a four-story

- l building would raise the question as to why that was, I mean
- 2 what that was.
- 3 COMMISSIONER ROBINSON: If in fact the board made such
- 4 a finding, that is the counterargument to my question, I
- 5 understand that.
- 6 MR. BROWN: With that I will turn it over to Ms. Sears
- 7 and Mr. Wagner who are with Bozutto.
- 8 MS. SEARS: Yes, good afternoon. My name is Barbara
- 9 Sears, Linowes and Blocker, and I represent Bozutto Homes
- 10 Inc., and with me is Clark Wagner of Bozutto, and just to
- 11 step back and say what really is the issue here as far as
- 12 the Bozutto situation is concerned, Bozutto was the builder
- 13 of building number three and Wynn can point out building
- 14 number three which is a multi-family four-story building
- 15 that has thirty units in it. That building is a condominium
- 16 building and has been built and sold, it is now owned by
- 17 others. Building number six is under contract by Bozutto
- 18 and they are getting prepared to start construction on that
- 19 building. Building number six is the building right above
- 20 it in green also, that building also contains thirty units,
- 21 it is four stories, it has thirty condominium units in it of
- 22 which 34 are Moderately Priced Dwelling Units (MPDUs). The
- 23 questions here that are raised are strictly whether the
- 24 building number three, which as measured by the Zoning
- 25 Ordinance is 53ft 8 inches, and building number six, which

- l is 50ft 10 inches are in violation of the project plan. I
- 2 think that is the extent of what we are dealing with.
- 3 COMMISSIONER WELLINGTON: Well, I think also you have
- 4 got to answer to the site plan because of the signature set.
- 5 MS. SEARS: I am sorry. I didn't hear you.
- 6 COMMISSIONER WELLINGTON: Of the signature set documents
- 7 for the site plan that referred to the height thereto.
- 8 COMMISSIONER ROBINSON: They had specific limitations on
- 9 the site plan on the signature set.
- MS. SEARS: Okay, well let's, the question is whether
- 11 those violate the existing approvals for the project plan
- 12 and the site plan, and the project plan itself as Wynn has
- 13 gone over and as Todd has mentioned, the project plan itself
- 14 starts with the RMX2C zone which does not set a height for
- 15 the particular project. There is no height limitation in
- 16 the zone. The way it is set is by reference to any
- 17 guidelines that are in the master plan, and as you have
- 18 heard, the guidelines in the master plan deal with the
- 19 orientation of the buildings in the general area to the
- 20 historic district. The master plan is quite clear and I
- 21 think uncontested as far as the evidence goes, that in this
- 22 location, in this particular location where buildings three
- 23 and six exist, all that is applicable is a four-story
- 24 limitation and it therefore was shown on the project plan to
- 25 be required at four stories. The param, if you will, of

- 1 45ft was on the provided side of the column. I think it's
- 2 also important to look at the RMX, the project plan
- 3 requirements in the Zoning Ordinance, and the project plan
- 4 requirements at Section 59(d) 2.1.2(d) state that what the
- 5 project plan has to include is a land use plan showing the
- 6 general bulk and height of the principle buildings. It's
- 7 the general height. That's what has to be shown, just the
- 8 general height. That was shown the general height, and it
- 9 was shown at four stories. Now we are in a T&D project and
- 10 Clark can answer this but the expectation of some range
- 11 similar to what the ranges are seen here, I think are very
- 12 logical. You have height measured at different points. In
- 13 this particular instance your height is going to be measured
- 14 at the mid-point of the grade of the street to the mid-point
- 15 of this type of roof and depending on where your grade of
- l6 the street is, you are going to have some variations. These
- 17 buildings are all the same types of buildings. There is no
- 18 variation in the buildings. Indeed building number one and
- 19 building number three, I think we can all be proud of the
- 20 fact that they won awards for the finest in family living
- 21 for units in these buildings, in the building that is
- 22 accused of being in violation.
- 23 So, the type of variations that we see here are
- 24 certainly normal variations to have expressed in a plan,
- 25 especially one as large as this, and as varied as this that

- is going to be implemented over time. The Zoning Ordinance
- 2 also proceeds that in a site plan there has to be a finding
- 3 that the site plan is consistent with the approved
- 4 development plan or project plan. In this case those
- 5 specific findings remain, were made as the site plans were
- 6 approved, and the requirement is that they be consistent.
- 7 And they were consistent, they were four- story types of
- 8 units and there is no dispute about the fact that they are
- 9 four-story types of units. The issues involved, I mean if
- 10 you look at those buildings their orientations to the north
- 11 of building number three, of building number six, you are at
- 12 least 120ft away from any townhouse that exists there. The
- 13 same thing in terms of building number six, you are at least
- 14 120ft away from any townhouse that exists there. So we don't
- 15 have a violation of the master plan in terms of the guides
- 16 that provided for the project plan.
- 17 The project plan requires a general height to be
- 18 shown. It requires you follow the guidance of the master
- 19 plan, which was four-story with no height limitation, and
- 20 you have site plans that were found by this board to be
- 21 consistent with the requirement of four stories, and then
- 22 you have implementation that's been going on, and been going
- 23 on very successfully. Then you have on the ground
- 24 orientation and compatibility that is very consistent and
- 25 one that has won awards as far as the community itself. So

- 1 I don't really see where we have a violation either of the
- 2 specific application of the law or created a situation where
- 3 there is some public harm here being done by what has been
- 4 implemented. So as far as work is concerned, the scale, the
- 5 character of these particular units with the Clarksburg
- 6 Historic District and with the surrounding uses around them
- 7 are all very, very consistent and very logical. I guess
- 8 that really covers the points I want to make. I will just
- 9 ask Clark if he has any points from a builder's stand point
- 10 that he would like to express to the board.
- 11 MR. WAGNER: Thank you, good afternoon Mr, Chairman,
- 12 and members of the board. One of the issues I want to
- 13 address is the four-story issue and the compatibility from
- 14 my experience which goes about twenty years in the urban
- 15 planning and home building business, and we have both built
- 16 within communities that are developed by others with
- 17 architectural codes in place and architectural review
- 18 committees. To name a couple in the area, Kentlands and
- 19 Kingfarm, and by example both of those communities have a 4
- 20 story height limitation for residential buildings. They
- 21 specifically do not have a numerical height limitation. In
- 22 fact most of the four-story buildings in those communities
- 23 are built very close to existing two-story, and three-story
- 24 townhomes. Some immediately adjacent to single-family
- 25 homes, and in my opinion all of them exceed 50ft in height

- l and are very well designed and are well designed because
- 2 they do not have to meet a numerical height requirement. So
- 3 I think the issue with compatibility and with the four
- 4 stories works as well in Clarksburg Town Center as it does
- 5 in these other communities.
- 6 CHAIRMAN BERLAGE: Okay, thank you very much. So Mr
- 7 Dugan you are next. I will freely entertain questions of
- 8 both the complainant and the alleged violators after we hear
- 9 from the public. We also have Mr. Dugan did you want to
- 10 speak? you do have time as well. Well go ahead, take a
- 11 chair and start talking. You are representing Craft Star.
- 12 MR. DUGAN: Yes, good afternoon, for the record my name
- 13 is Tim Dugan. I am representing Craft Star. With me this
- 14 afternoon is Kevin Kennedy of Shulman Rogers, our firm, and
- 15 also Mr. Jay O'Brien the architect. We submitted for the
- 16 record a letter earlier that will provide further detail
- 17 than what we are presenting today. But let me begin. We
- 18 certainly incorporate by reference to Staff statements and
- 19 exhibits as well as those that were submitted earlier by the
- 20 other builders. We would absolutely encourage the planning
- 21 board to stay the course and preserve the county's
- 22 reputation for certainty. Apart from the various other
- 23 arguments that support rejecting the CTCAC's claims to roll
- 24 back the clock seven years is that we have got to preserve
- 25 that reputation. We have got to affirm the long-standing

- 1 interpretation of the site plan conditions of approval.
- 2 Obviously we saw all those homes that have been built out
- 3 there, the site plan conditions approval that have been
- 4 complied with and been over in great detail. We would say
- 5 as a procedural matter that the claim that the CTAC is too
- 6 late to make this assertion, we believe that the subsequent
- 7 site plans that eliminated the 45ft reference, the
- 8 parenthetical reference, is in effect that data sheet
- 9 superseded that issue and as Commissioner Wellington noted,
- 10 the signature set, the original one which was then as over
- 11 the subsequent iterations A through G we would say that in
- 12 turn also eliminated that issue there and as we proceed
- 13 forward. And I so, based on that though then what we would
- 14 be saying is even as you know under the Administrative
- 15 Procedures Act, the determinations, the elimination of the
- 16 45 at the time of the site plan approval, after that thirty
- 17 days went by, that is the position that the planning board,
- 18 we think, also could occupy on this position here. We don't
- 19 think that a project plan is a site plan disguised, you know
- 20 as a disquised site plan and I think we have to keep that
- 21 balance as well. The 45ft height at this point would not
- 22 carry any benefits, it would be an empty benefit under these
- 23 circumstances considering the tremendous hardship that's
- 24 involved. We will have our architect discuss the incredible
- 25 level of detail that's put into these units and they are not

- l redone every single time a unit arises here. The remedy
- 2 itself would involve a tremendous amount of work and the
- 3 like for a very well put together professional work product,
- 4 as you heard the award for living, residential living that
- 5 was mentioned earlier as well, it would be a very draconian
- 6 move. The 45ft dimension is illustrative. It has no
- 7 inherent or intrinsic value to it either.
- 8 COMMISSIONER ROBINSON: Doesn't it create an
- 9 expectation on the part of the community Mr. Dugan?
- 10 MR. DUGAN: It think it's an illustrative that augments
- 11 the 4 story notion that really carries through everything,
- 12 and so unless one parenthetical phrase, like others, are
- 13 clearly that are in the project plan, carry and rule the
- 14 site plan when we get into the greater policy details,
- 15 that's (overspeaking).
- 16 COMMISSIONER ROBINSON: I suppose it's 45ft and then it
- 17 becomes 80ft, at site plan, isn't that kind of a
- 18 contradiction in the expectation of the project plan
- 19 hearing.
- 20 MR. DUGAN: Well I appreciate your analogy for that of
- 21 course but these are residential homes, the site plans will
- 22 come before you and is it a reasonable, logical extreme to
- 23 go to an 80ft building. To come to that point I think we
- 24 are looking at what we all understand to be reasonable when
- 25 we look at a lot of elements of a project plan or a site

- l plan, especially your point there, which I think should
- 2 provide the planning board comfort in that point there. I
- 3 understand your point there in terms of just reading
- 4 (overspeaking).
- 5 COMMISSIONER ROBINSON: So you are saying that if it's
- 6 50ft in the project plan it comes in, in site plan, it's
- 7 clearly site plan is 53ft, it's within our discretion to say
- 8 at site plan we think 53 is roughly compatible, it meets all
- 9 the other standards that were embedded in the project plan.
- MR. DUGAN: At the same time in my letter to you I also
- 11 noted that I think you need to look at, for example,
- 12 development plans where you get lots of detail and you say
- 13 now what is illustrative and what is binding for example,
- 14 and I think that's the type of thing that we are discussing
- 15 here as well. If I can continue with this notion here,
- 16 thank you.
- 17 COMMISSIONER ROBINSON: Please do, I apologize for the
- .18 interjection.
- MR. DUGAN: Not at all, again, as noted earlier the
- 20 project plan had a preamble to that data sheet and it had on
- 21 the next data sheet you are going to have elements that are
- 22 shown and those required. On the next page it had the term
- 23 "proposed and required" and I think "proposed and shown" and
- 24 the like is indicating that those were intended to be
- 25 illustrative there. The master plan fundamentals as you

- 1 know and really the master plan are based upon stories, they
- 2 talk about four stories but they also talk about 8 stories,
- 3 with even eight stories would be compatible within walking
- . 4 distance of the transit weight station and the like, but
 - 5 that's sort of the building block element that I think they
 - 6 are focusing on there.
 - 7 The Zoning Ordinance itself also which was mentioned
 - 8 before has anticipated that a project plan will be modified
 - 9 by the site plan. It makes sense as we all know that a
- 10 project plan level, that level of detail cannot rule at the
- 11 site plan otherwise you are subsuming in the project plan
- 12 all of your issues with respect to site plans. The passing
- 13 reference to the 45ft supports that because of the fact that
- 14 it's only noted on that one page there. In contrast, you
- 15 have got six pages of conditions of approval, you then get
- 16 into sure findings and the like and I think we have to look
- 17 at all that and it doesn't carry forward over the years, I
- 18 mean from 1993, 1998, we are now in 2005, we have to try to
- 19 remember that and not bestow a perfect 20/20 thing rolling
- 20 back the time and I think that's a reasonable approach. The
- 21 Zoning Ordinance anticipates the fact that you are going to
- 22 have site plans that are not going to adhere exactly to the
- 23 project plan and that is, and to conclude otherwise, would
- 24 really modify the statutory scheme. You have in the statute
- 25 itself, where they noted, fundamental elements of a project

- 1 plan cannot be modified by the planning staff. Is this a
- 2 fundamental element in a project plan? I would say not.
- 3 What is fundamental in a project plan? Certainly that which
- 4 is recited in the master plan itself, such as four stories.
- 5 I think that is fundamental. When you get past that you
- 6 have got to look at other circumstances and the like. But
- 7 in there it says that which isn't fundamental, that allows
- 8 the planning staff to make minor amendments. Can we roll
- 9 the clock back seven years and figure out exactly what the
- 10 precise process was to make that determination that the 45
- 11 (overspeaking).
- 12 COMMISSIONER ROBINSON: That's minor amendments to the
- 13 site plan?
- MR. DUGAN: They are minor amendments to the project
- 15 plan. What I was going to say was they are allowed to make
- 16 minor amendments to the project plan as long as they are not
- 17 fundamental to the project plan.
- 18 COMMISSIONER ROBINSON: But the site plan would be more
- 19 restrictive.
- 20 MR. DUGAN: The site plan would be, if I could finish
- 21 half my thought, and then I would be happy to address that.
- 22 The clear spot in terms of what is fundamental to a project
- 23 plan I think is that which is rooted in the master plan. I
- 24 think that is our easy case. Beyond that we then have to
- 25 look at other circumstances but you have to agree that the

- l Staff in that grey area has been given authority to consider
- 2 things that are considered fundamental or not without coming
- 3 all the way back to the planning board. And looking back
- 4 seven years, this 45ft in params seems to have been
- 5 interpreted at that point and throughout the years as being
- 6 not fundamental to the project plan. But what I would also
- 7 say is, and if we are not tied up to the precise procedural
- 8 elements of that, that subsequent site plans that came
- 9 before this planning board with public hearing and the like
- 10 where all of these issues were available at the time, would
- 11 also constitute what would be considered a major amendment
- 12 to a project plan. Again, we don't have all of this data
- 13 seven years ago and all of that but the planning board, when
- 14 they make any little change, is considered a major amendment
- 15 that goes through a public process. That I think is also
- 16 how this may have occurred but both ways are set forth in
- 17 there. The other aspect is 45ft fundamental would be, look
- 18 at the physical layout of the Clarksburg Plan we were
- 19 looking at the videos and the like and all of that. We have
- 20 looked at the layout and how attractive it is there. That
- 21 would indicate to me that that was not fundamental otherwise
- 22 we have something out of sorts I think. We would see
- 23 something there. We talked earlier and Ms. Sears mentioned
- 24 the fact that a site plan has to be consistent with the
- 25 project plan. A building permit has to be strictly in

- 1 compliance with the site plan. That clearly in the same
- 2 section of 59(d)3 indicates there is a difference in how
- 3 tightly one has to adhere to one of the two there, and I
- 4 think that's important. The 45ft height, these were
- 5 standard buildings. It was mentioned earlier. We have got
- 6 to have them established and they have got to be able to
- 7 move and flow with the flow of the topography otherwise this
- 8 would not make any economic sense. That makes sense that
- 9 that would not then rigidly apply here because you have got
- 10 undulations in the terrain and the like, you couldn't
- 11 possibly hang your hat on the, God forbid as we all know,
- 12 the height measurement with respect to the terrace and you
- 13 all worked on that and everybody has worked on that for
- 14 years, that would be an incredibly difficult thing to apply
- 15 rather than four stories. That makes sense here, especially
- 16 in the context of a project plan. The last thing we would
- 17 have to say is this planning board understands we have got
- 18 to shun ulterior motives. We were very, at Craft Star very
- 19 worried about this some notion that the height issue was
- 20 being raised to force a compromise with respect to the
- 21 retail center. Surely we are not going to let that happen
- 22 with respect to the process at park and planning that we
- 23 worked so hard to come up with great projects and make them
- 24 move forward, we certainly wouldn't want that to happen.
- 25 With the remaining time, with your permission, I would like

- 1 Jay O'Brien to speak. He is the architect at Craft Star and
- 2 can explain to you the elements that went into the design of
- 3 the project for their models and I will hand out, I have two
- 4 color renderings or brochures that they hand out, if with
- 5 your permission I will hand those out. Mr. O'Brien.
- 6 CHAIRMAN BERLAGE: Go ahead sir.
- MR. O'BRIEN: Good afternoon. My name is Jay O'Brien
 - 8 with Creaser O'Brien Architects and we have worked with
 - 9 Craft Star Homes for quite a few years, going on ten now,
- 10 designing products for them, including this two over two
- 11 townhouse condominium project and we are very proud of the
- 12 work and how it turned out in the field. As you can see
- 13 when the handout gets to you they are four-story townhouses.
- 14 The height to the (inaudible) at the front is just 41ft and
- 15 a half. The only issue we are dealing with is the steepness
- 16 of the roof and to comply with the traditional new town
- 17 development, they are not really requirements but the
- 18 suggestions was to have a much steeper roof, perhaps a 6/12
- 19 maybe even an 8/12 roof pitch on there which is a more
- 20 traditional, but that cut our, I mean that raised the roof
- 21 so much that it was just too steep, so we cut it down to
- 22 5/12 which is less steep than the single-family homes and
- 23 less steep than the other townhouses which are just down the
- 24 street from this one. The height of these buildings is
- 25 maintained primarily by the ceiling heights which is

- 1 traditional for the market place now, 9ft in the living
- 2 rooms, 8ft in the bedrooms and the floor systems which are
- 3 deep enough to maintain rigid floor systems so they don't
- 4 deflect and to provide enough room for the air-conditioning,
- 5 sprinklers and the other piping. Just adding those numbers
- 6 up together you get what we show on there, which is the 41ft
- 7 6 inches to the underside of this outfit, and then the
- 8 minimal roof pitch on top of that. That is basically all
- 9 that we need to bring up here. That has a very traditional
- 10 feel, the trim on it, the window sizes are those required
- 11 for egress per the building code. The amount of trim over
- 12 the top of the windows is that which is required for the
- 13 traditional new town look, and it's not going to be able to
- 14 make them shorter.
- MR. DUGAN: Okay, last few comments from my colleague.
- MR. KENNEDY: Thank you for your indulgence. The point
- 17 we just want to remind folks of is that we are playing way
- 18 past this with the approvals that have been coming through
- 19 with pulling permits and selling homes. Right now we have a
- 20 sixteen-unit building that is ready to go that we sold out
- 21 at, based upon this architectural make up. We have got a
- 22 ten-unit building that is sold out that's under
- 23 construction. There are lots of folks that are going to be
- 24 disappointed if something happens to the approvals with
- 25 respect to those units that are already under contract.

- 1 Secondly, I am going to defer to these guys in terms of you
- 2 know the precise legal particulars but changing this product
- 3 is not an easy undertaking. As Mr. O'Brien indicated it's
- 4 not something that can just be whipped up, and we cut down
- 5 the roof, it affects the whole system.
- 6 CHAIRMAN BERLAGE: Okay, thank you very much, your
- 7 time's up.
- 8 COMMISSIONER WELLINGTON: Can I just ask Mr. Dugan a
- 9 question, which I will be addressing to the other counsels
- 10 too. As we listen to the testimony that you all come back
- 11 which I did not get an answer to the question of the actual
- 12 height numbers that were on the, in the signature set where
- 13 listed 35ft for single-family, townhouse, and townhomes and
- 14 courtyard townhomes, and then for multi-family 45ft. So
- 15 that was signature set at site plan, that wasn't just a
- 16 project plan.
- MR. DUGAN: Right, the first site plan. Okay, a good
- 18 point.
- 19 COMMISSIONER WELLINGTON: So I would like to understand
- 20 how that would just be a guideline at that point, that's the
- 21 final site plan. The other thing, excuse me, I want to
- 22 mention that you all should think about is that in the
- 23 original project plan approval taking a look at the Staff
- 24 Report, and the Staff Report's attachment of development
- 25 standards, where it changed the headings and it said not

- l that it was proposed but that it was provided and it
- 2 mentions in the findings which were adopted by the board,
- 3 that the following chart describes the conformance of the
- 4 project plan with the development standards required for the
- 5 optional method. So those are things, and that also had the
- 6 parenthesis with the height limit, so I do, I want to
- 7 understand where the wiggle room was given these two
- 8 documents.
- 9 CHAIRMAN BERLAGE: Okay, we now have about a dozen or
- 10 so speakers from the general public. We will take you in
- 11 groups of three. Niran Nagda, Jaya Nagda, and Esther King
- 12 are the first three. Niran Nagda and Jaya Nagda you have
- 13 together six minutes, you can divide it any way you wish.
- MR. NAGDA: We probably just need three minutes. Mr.
- 15 Chairman and members of the commission I am Niran Nagda and
- 16 Jaya Nagda is with me here. My wife and I currently live in
- 17 a condominium on the Clarksburg Square Road, the same road
- .18 that has been shown and the same set of condominiums that
- 19 have been discussed. A little bit of related history before
- 20 I go on and that is our family moved to Montgomery County
- 21 particularly German Town in the mid seventies. The members
- 22 of the Germantown community, including my wife, appeared
- 23 before this commission in the early eighties when the issue
- 24 was not that much different than now. It was again to
- 25 uphold the Germantown master plan and for the developers and

- l the builders to keep their promises. What was different
- 2 then, I feel, was that we had the planning commission staff
- 3 supporting us, the citizens, to improve the situation.
- 4 Ultimately the Board with staff's assistance and community
- 5 support did just that back then. But now with Clarksburg
- 6 Town Center the situation appears to be different. It is
- 7 interesting to note that when we first raised the issue
- 8 about the height of the condominiums in August of 2004 and
- 9 requested that we get data on how tall some buildings are,
- 10 all we got was a run around. And that went on for at least
- 11 four months, both from Staff and from the private sector.
- 12 It certainly doesn't take that length of time to ascertain
- 13 the height from engineering drawings or for that matter from
- 14 someone to actually measure the same. One more point
- 15 regarding height. The definition of height of a building,
- 16 and this is taken from your website, begins with the
- 17 vertical distance measured from the level of approved street
- 18 grade opposite the middle front of the building and it's a
- 19 pretty long definition. The key word here is "measured".
- 20 The building height measured. The definition doesn't say
- 21 specify the height in a number of stories or anything else.
- 22 That can be vague. Mr. Chairman when you or I go to a
- 23 doctor and we need a prescription, the doctor doesn't
- 24 prescribe take a couple of tablets of something, she (my
- 25 doctor is a female) writes 300mg of X,Y,Z, per day of

- l something that is specific. It is inconceivable that a plan
- 2 when one needs to go from somewhat more general to specific
- 3 as in going from a project plan to site plan would not
- 4 specify the height in feet and inches. I certainly feel
- 5 that when the Staff Report finding essentially states that
- 6 everything is okay and there is no violation, one wonders
- 7 whether it is coming from the perspective of benefiting the
- 8 developer and the builders and at a cost to the community.
- 9 For all the reasons that the CTCAC made in the video
- 10 presentation and notwithstanding the Staff Report, we
- 11 believe that the board should find that the alleged
- 12 violation does constitute a violation and initiate a
- 13 compliance hearing. By doing so the board will assert
- 14 itself in the direction of making the Clarksburg Town Center
- 15 a community that the planners, the board and the citizens
- 16 envisioned some time ago. Thank you.
- 17 CHAIRMAN BERLAGE: Thank you. Esther King.
- 18 MS KING: Yes, my name is Esther King and I have lived in
- 19 Clarksburg for close to forty-nine years, all of my married
- 20 life. Clarksburg was a small town, which is now being
- 21 developed into a very large town. I belong to the
- 22 Clarksburg United Methodist Church. This church is in the
- 23 historic district and backs up to the new Town Center. It
- 24 is a beautiful historic church and sits on one of the
- 25 highest pieces of land in Clarksburg and has always been a

- 1 focal point of Clarksburg. It states in the 1994 Master
- 2 Plan that the new development immediately to the west of the
- 3 district should be low rise to abide compatibility. The new
- 4 development near the church on Spiral Street should be
- 5 smaller in scale and sufficiently set back from the church.
- 6 The 1994 Master Plan states that our church should be
- 7 highlighted, focal point in the planned construction of the
- 8 Town Center. Also, we have been told by the developers that
- 9 our church would be a focal point of the construction. What
- 10 is being built now are very large many story townhouses
- 11 towering over the church. The townhouses next to our church
- 12 are three stories above ground and some with dormers. These
- 13 townhouses overbears the church, which happened to be making
- 14 our church, what happened to be making our church the focal
- 15 point of the town center. With the height of these
- 16 townhouses, the so-called main street from the Town Center
- 17 where you are supposed to look up and see our church as a
- 18 focal point is lost. This is very wrong having the towering
- 19 townhouses built so close to our church and also is against
- 20 the 1994 Master Plan. Thank you.
- 21 CHAIRMAN BERLAGE: Thank you very much. The next group
- 22 will be Lynn Fantle, Jim De Arros and Kiandokht Afshar.
- 23 Lynn Fantle is first.
- MS. FANTLE: My name is Lynn Fantle and I live on
- 25 Clarks Crossing Drive, roughly across the pond from those

- 1 condos and the three-story townhouses. I am one of the
- 2 first homeowners in Clarksburg Town Center and when we moved
- 3 to Clarksburg and we were looking at the houses there, we
- 4 were attracted to it because it's a pretty place.
- 5 Clarksburg is very pretty. It's historic, it's rural, it's
- 6 not congested, it doesn't feel overly urban and yet it's
- 7 relatively convenient, at least for our lives. Anyway when
- 8 we were looking at the houses we had to do a lot of research
- 9 because there were no buildings, there was nothing at that
- 10 point, except for a few trailers in a park and we had to go
- 11 and come down here and get the master plan and get all the
- 12 County documents. We looked up everything in the Gazette.
- 13 We did every bit of research that we could do and I do
- 14 remember seeing the 45ft limitation by the way. But that
- 15 was all I could do at the time. However, as the community
- 16 developed, as we started getting more houses, more
- 17 townhouses, more people, it was a really good thing because
- 18 it just kept getting prettier and prettier, and people as
- 19 they were building decks and fences and whatnot would refer
- 20 back to the HOA and they would refer back to the rules that
- 21 we were all supposed to follow as homeowners for our decks,
- 22 for our fences, for our patios, whatever, and they generally
- 23 without even having to make much of an effort follow those
- 24 rules because they believed that the character and the
- 25 spirit of them were good and that's what makes Clarksburg a

- 1 inice place to live. I personally don't believe that these
- 2 condos meet either the letter or the spirit of the rules
- 3 that were established for the development because I look out
- 4 any window in my house these days and that's the first thing
- 5 I see, even though they are quite a bit away from me, they
- 6 are probably a quarter mile away. They are the highest
- 7 point in the community, and they tower over the townhouses
- 8 that are in front of them and indeed they tower over the
- 9 single- family homes that are across the pond from those
- 10 townhouses. While I don't think you need to do anything
- 11 about taking people out of their homes, I don't think you
- 12 should allow any more buildings of that height and magnitude
- 13 to be built because they really are too big for our
- 14 community. It's not KingFarm, it's not the Kentlands, it's
- 15 not Rockville it's Clarksburg and in Kingfarm and in
- 16 Kentlands the condos that they were speaking about that are
- 17 supposedly the same height, they are all on the edge of the
- 18 community, they are not right in the middle and they are not
- 19 on the highest point in the community, so they don't tower
- 20 over the centre of the community. They are off segregated,
- 21 away from the other homeowners even if they are fairly close
- 22 to a townhouse, they are not right in the middle of
- 23 everything. That's all I have to say.
- 24 CHAIRMAN BERLAGE: Thank you. Mr. De Arros.

- 1 MR. DEARROS: Good afternoon Mr. Chairman and
- 2 distinguished Commissioners, and everyone present. My name
- 3 is Tim De Arros residing at 12721 Piedmont Trail Road in
- 4 Clarksburg, and I settled into residence three years ago
- 5 coming up this May. At the time most all of the surrounding
- 6 area was still fields as Lynn has mentioned, fields of mice
- 7 and birds, and they reminded us because they came to visit.
- 8 Prior to settling our vision for Clarksburg was very
- 9 exciting. The descriptions of the NV Homes sales staff and
- 10 the Terrobrook folks, was amazing. Now the descriptions
- 11 were enough to make anyone want to move to our neighborhood.
- 12 While we settled in and watch the landscapes change from
- 13 fields to roads and then foundations and homes I would walk
- 14 around with my dog and go around the community. I would go
- 15 all the way around the Murphy Grove Retention Swamp, I would
- 16 go up on the hills near the Bozutto buildings as they were
- 17 being constructed, and I really had an excellent time
- 18 getting to meet all of the neighbors. This community is
- 19 without a doubt outstanding and we really enjoyed settling
- 20 in here and getting to know these folks. So I would walk
- 21 around two or three times a day for a chance to meet
- 22 everybody I could. Now I am relating this story as a quick
- 23 background to say this, something suddenly happened and
- 24 there was a profound shift in the paradigm in the community.
- 25 The prospective of all the neighbors that I talked to was we

- 1 found ourselves wondering how high the Bozutto buildings and
- 2 other buildings were going to be when they were finished.
- 3 They seemed to us to be as we walked along Sugarview and
- 4 Piedmont Trail they seemed to be out of character with the
- 5 rest of the neighborhood. The neighbors on Piedmont Trail,
- 6 on Cool Brook Lane, on Sugarview, in Brighton Square,
- 7 everybody I talked to couldn't imagine that what was being
- 8 constructed was actually in keeping with the expectations of
- 9 everybody who had just moved in. So in my experience it's
- 10 not just who had just moved in. So, in my experience it's
- 11 not just a few folks find the same opinion, it seems like it
- 12 came from somewhere, so the conclusion seemed to be that
- 13 something was unequal to what the expectation was.
- 14 Arguments by the respondents to the effect that how
- 15 beautiful and award-winning these buildings are, are not
- 16 really germane to what our point is, arguments to what is
- 17 actually the question of uncertain trail of clear and
- 18 definable specificity are what is important. This body
- 19 would expect further definable granularity as we move from
- 20 master plan to a preliminary plan to a project to site plan
- 21 and more exacting detail in the engineering paperwork. Now
- 22 in conclusion as a resident of Clarksburg Town Center, one
- 23 who is truly inspired by the diversity and the cohesiveness
- 24 of the neighbors, I ask the board to make a finding in favor

- 1 of Clarksburg Town Center Advisory Committee's complaint and
- 2 to be sure of further compliance in the future.
- 3 CHAIRMAN BERLAGE: Thank you. Ms. Afshar.
- 4 MS. AFSHAR: Yeah, actually I am here to talk on behalf
- 5 of my daughter. She is out of town but in last minute she
- 6 doesn't want to talk about it, that's why I am not talking
- 7 about the situation.
- 8 CHAIRMAN BERLAGE: Okay that's fine, thank you for
- 9 coming. The next group is Steven Burns, Kathie Hulley and
- 10 Paul Majenski.
- MR. BURNS: Good afternoon. Thank you very much for
- 12 hearing us all today. My name is Steve Burns. I am an
- 13 elected member of the Condo Board for the evil castle of
- 14 terror, building three that you have all heard about today.
- 15 It is my home, I live there, I am not some investor, and I
- 16 am here to basically speak on behalf of myself, and many of
- 17 the residents that I speak to in the hallways there. We
- 18 live in a building and we find it to be a beautiful building
- 19 by the way, that was built to approved plans, it's in full
- 20 and complete compliance with the zoning for Clarksburg Town
- 21 Center, and occupancy permits were issued to us, so we are
- 22 wondering why we are here tonight and the reason is because
- 23 a few individuals with an agenda which conflicts with the
- 24 Clarksburg Town Center new urban plan are here with their
- 25 concerns and I respect their rights to do that as

- 1 individuals and to address their concerns to the County, but
- 2 by placing this objection upon a building it does have
- 3 consequences for us all. When selling our homes we have to
- 4 notify potential buyers that this issues exists. Changing,
- 5 if there was to be a change to the building, basically the
- 6 mirror building is going to be built to mirror building
- 7 three across the street, across Clarksburg Square Road.
- 8 That would kind of visually throw the neighborhood design
- 9 elements out of balance especially if you take the main
- 10 entry in on Clarksburg Square Road, and I also want to point
- 11 out the elevator buildings, especially in up county are very
- 12 hard to find and, personally speaking, it might be
- 13 financially beneficial to me in fact if you guys did stop
- 14 building any buildings of the same height of the one I am
- 15 in, but I think it's a very myopic view and it doesn't look
- 16 toward the needs of the whole community. In my building we
- 17 have residents with mobility issues, and the elevator
- 18 building is a God-sent to them and as pathetic as it sounds,
- 19 we are living in what amounts to be the low-cost housing in
- 20 Clarksburg. All the housing that you have in question now
- 21 is really what amounts to low-cost housing in Clarksburg.
- 22 It's ridiculous. I sold a single-family home on the eastern
- 23 shore where I lived for twenty years, and it's not even
- 24 half, I didn't even get half of what I had to pay for the
- 25 condominium there, but that's a problem the whole County has

- l obviously. I talked to a lot of my friends and neighbors in
- 2 the hallways and even in our apartments there, and we have a
- 3 common perception that what we are looking at here, at least
- 4 partially, is an example of elitism. You know, we don't
- 5 want those people in our community, these low-class people,
- 6 these people that have mobility issues, but nonetheless I
- 7 respect their rights as individuals to object but I would
- 8 like to remind the commissioners that the CTCAC is just a
- 9 few individuals, they were formed ad hoc, their officers are
- 10 not democratically elected, they are not our civic
- ll association and with the two hundred signatures, we have two
- 12 hundred people in just the Bozutto buildings alone, so they
- 13 do not represent the majority of the Clarksburg community.
- 14 Commissioners I am going to close by saying by finding our
- 15 building in compliance today, you are going to remove a
- l6 large wedge which divides this community and to all my
- 17 Clarksburg neighbors I would like to say let's all work
- 18 together at building a Clarksburg of equals. Thank you.
- 19 CHAIRMAN BERLAGE: Thank you. Kathie Hulley.
- 20 MS HULLEY: My name is Kathie Hulley. I am the chair
- 21 of the Planning Committee of the Clarksburg Civic
- 22 Association. During the master planning process for
- 23 Clarksburg many meetings were held over many years to
- 24 assisting of residents, park and planning staff and the
- 25 owner of the Town Center land. It has always been the

- l understanding of the Clarksburg Civic Association that the
- 2 town center area should be compatible with the historic
- 3 district. To this end the project plan in 1994 determined a
- 4 height restriction of 35ft for single-family and townhomes
- 5 and 45ft for multi-family homes, and these should be the
- 6 defining heights for the buildings in this area, whether
- 7 they be three or four stories they should fit in with the
 - 8 35ft and 45ft height restrictions. The heights in feet from
 - 9 the project plan were not arbitrary heights to be discarded
- 10 with maybe the arbitrary stroke of a pen. We are disturbed
- 11 that this defining height should be discarded in preference
- 12 to a nebulous definition of a story. Consider this. An
- 13 extra 2.5ft ceiling height on each floor of a four-story
- 14 building equivalent building is equivalent to adding an
- 15 extra 10ft or other story to that building. This totally
- 16 distorts the balance between the historic district and the
- 17 Clarksburg Town Center district as was envisaged in the
- 18 master plan that we all worked so hard for. There is a
- 19 condominium building which has been constructed that exceeds
- 20 45ft. This building is on very high ground with no
- 21 consideration given to the sensitivity of how this would
- 22 mould with the town as a whole. It towers over the area and
- 23 is not in keeping with the concept of the Clarksburg Town
- 24 Center district. The Clarksburg Civic Association requests
- 25 that no other condominium buildings be built to that

- 1 specification but should conform to heights specified in
- 2 feet, not stories. I might point out that the Kentlands and
- 3 Kingfarm condos were mentioned. These are not adjacent to
- 4 an historic district. They have nothing to do with
- 5 Clarksburg. The acceptable heights of ceilings now is
- 6 higher than it was. This may change again in twenty years.
- 7 Clarksburg is due to be built out over twenty years or more.
- 8 It might be nice to have heights that are lower than some
- 9 of the places in the Clarksburg district than they will be
- 10 more efficiently heated and we might be grateful for that at
- 11 some time. We urge you as the planning board to enforce a
- 12 35ft and 45ft height limits. After all if it's so easy to
- 13 remove what we considered to be a very important aspect of
- 14 the Town Center district what's the purpose of having a
- 15 project plan at all. In this case there was no input from
- 16 the community in a matter that should at least have had a
- 17 public hearing. Residents of Clarksburg have over the years
- 18 devoted untold hours of totally volunteered time to ensure
- 19 that Clarksburg would be a town of which we can all be
- 20 proud. All have had no pecuniary motive whatsoever. There
- 21 are many of us who take time from our jobs to help safeguard
- 22 the development of our town. It is disappointing to say the
- 23 least that after great consideration that was given to the
- 24 project plan when written, that seemingly cavalier actions

- 1 can spoil the planning and the image of Clarksburg. Thank
- 2 you.
- 3 CHAIRMAN BERLAGE: Thank you. Mr. Majenski.
- 4 MR. MAJENSKI: I am Paul Majenski, Piedmont Road,
- 5 Clarksburg. I am the current president of the CCA. In my
- 6 opinion the main reason you should uphold the max height is
- 7 as the CTCAC presented. The max height limit in feet makes
- 8 more sense than in stories. A public harm has been done by
- 9 altering the community's desired skyline and views, and by
- 10 using a prize-winning high-rise instead of a price-winning
- 11 right-size building. I would like to add testimony
- 12 concerning the community's long continued voyage opposing
- 13 the tall buildings in the Town Center. Since I have been a
- 14 member in 1989 the CCA has supported views and scenery and
- 15 as I indicated in written testimony, Appendix M, two and a
- 16 half weeks ago the CCA unanimously resolved to continue to
- 17 support the town center's project plan, the 45ft maximum
- 18 height. The CCA has fought very hard for a decade and a
- 19 half to make the Town Center a special town. At every step
- 20 the CCA endorsed a three-max limit and to it agreed to a
- 21 three to four story max. Why a three or four story max? I
- 22 talked with Joanne Woodson this week, she is our historian
- 23 and a member of the Citizens Advisory Committee whose name
- 24 is right here on the master plan. I also talked with Norman
- 25 Meece and Dexter Umbarton earlier this week. I emailed

- 1 Dexter rather. Joanne remembered it as I did that there was
- 2 some discussion about what you measure from, is it four in
- 3 the back or three in the front. That's how she and I
- 4 remembered it. Conversations with Norman Meece indicated
- 5 that he was at that time they were talking about four normal
- 6 stories as far as that time goes. Kathy and I were the
- 7 secretaries at CCA for sixteen of the last eighteen years.
- 8 I think you should trust our memories on this. The late
- 9 Jean Honorfrey was our planning committee chair in the pre-
- 10 ninety six times when the project plan was being approved,
- 11 having been the committee's leader though on this process,
- 12 she would have continued our desire to limit the height.
- 13 Thank you very much.
- 14 CHAIRMAN BERLAGE: Thank you very much. Okay, Ms.
- 15 Presley you have seven minutes for a rebuttal and summation.
- 16 And then we will deliberate.
- MS. PRESLEY: Thank you again. First, I would like to
- 18 address the gentleman in the Bozutto condominiums and this
- 19 is separate from my rebuttal, I just want to let him know
- 20 that the CTCAC is in fact in favor of the intent of the
- 21 master plan which is for a complete mixed-use development
- 22 and that we in fact were here testifying on behalf of
- 23 Bozutto trying to assist them in increasing the size of
- 24 manor homes from nine units to twelve units, so we are not
- 25 at all opposed to, or not at all elitist and it's an

- 1 unfortunate comment that I think has been perpetuated by
- 2 some builders who are disturbed by our actions. So that
- 3 aside I am also very disturbed at the comments Mr Dugan to
- 4 imagine that a project plan loses its validity after seven
- 5 years, to imply that the CTCAC is somehow, we are outdated
- 6 because we are saying that you should uphold that. That has
- 7 nothing to do with the issue. I have heard people from
- 8 staff and heard the developers and their lawyers all talk
- 9 about the way something looks, and what about the Zoning
- 10 Ordinance, the time for talking about the Zoning Ordinance
- 11 was prior to the approval of the project plan. If Mr Brown
- 12 had a problem why did he allow his client to submit drawings
- 13 even up to the point of site plan that still stated 45ft
- 14 limit. Would you not have advised them to take that off and
- 15 just go with four stories, it doesn't make any sense. And
- 16 still in all of our research we have not found where that
- 17 genericizing the four stories has actually been approved or
- 18 does anything to change the requirements of the project
- 19 plan. Our feeling is just totally if you ignore the
- 20 violation then you might as well not have project plans in
- 21 the future. You might as well tell developers here's the
- 22 master plan, here's your general concept, now go do whatever
- 23 you want according to what the market will bear. And that
- 24 does not do us a service. We have indicated, if you go
- 25 through the documents, Kim if you will bring up please the

- l site plan, it's right over here, I am sure you are familiar
- 2 with them but you can see on the drawings, those tables that
- 3 Wynn referenced, there are on the developer's submission at
- 4 site plan. What does that tell you? If a developer submits
- 5 a 45ft, why should he go then and change that to a four-
- 6 story generic, and where was that approved? I still haven't
- 7 heard today where that was approved. We don't see any
- 8 notation of that at all. The only thing we see, staff
- 9 mentioned that there were some later amendments. Later
- 10 amendments indeed, but no later amendment to this as a
- 11 height. We found one drawing that's not noted in any other
- 12 record or anything. One drawing that has a line through it.
- 13 It's a site plan drawing, copy of the same one from the 1998
- 14 approval. It's got a line through the data table that
- 15 actually describes 35ft and 45ft and I believe it has Wynn's
- 16 signature on it, but there is no notation of it anywhere
- 17 else, and it doesn't make sense to us. The parts aren't all
- 18 adding up. What does make sense to us is that in the master
- 19 plan, I want to go back to this again one more time, there
- $20\,$ was not a segregation of the historic district to the effect
- 21 that only it would have that particular character, it states
- 22 here that plan continues, it will be part of an expanded
- 23 town center. It also states, you've got the copy in front
- 24 of you, but on page 3 these things are not made up by us,
- 25 they were included in the master plan. They were drivers.

- 1 They were listed and approved by the board and submitted by
- 2 staff as drivers for the master planning process. Town
- 3 center which is compatible with the scale and character of
- 4 the Clarksburg Historic District. It doesn't say Clarksburg
- 5 Historic District and few surrounding areas in the buffer
- 6 zone, it talks about the Town Center, that's all of the Town
- 7 Center will be compatible with the scale and character of
- 8 the historic district. It is currently not, if you go
- 9 beyond 45ft, compatible with the scale. I understand the
- 10 buildings are beautiful but I am sure Sears Tower at one
- 11 point won an award also. So it's not ridiculous to expect
- 12 that in order to preserve the character of that district
- 13 that the builder has to come up with a way to meet 45ft. If
- 14 that means they have to determine to go to three stories in
- 15 some areas, well then that's the case. That's what was
- 16 determined by this board. That's what we expect to be
- 17 upheld. Did you have anything to add Kim?
- 18 CHAIRMAN BERLAGE: Thank you very much. I am sure
- 19 there will be a bunch of questions. I just want to make it
- 20 clear at this point, we have received all the testimony and
- 21 the board is free to ask questions of the complainant or of
- 22 the respondents, and the issue before the board is whether
- 23 or not there are violations of the respective site plans and
- 24 of course the burden of proof is on the complainant to
- 25 establish the violation. Madame Vice Chair.

- VICE CHAIR PERDUE: Yes, for the complainant. The
- 2 Staff Report on page seven has a set of, it has a chart that
- 3 has some heights including heights for townhouses, a number
- 4 of which exceed 35ft, and I note that the site plan, I am
- 5 sorry, the chart that was on the back of the signature set,
- 6 that's what we've got that looks like this, in addition to
- 7 including the 45ft limit has a 35ft limit for townhouses.
- 8 So, is your position that all of those townhouses are also
- 9 violations?

-18

- MS. PRESLEY: Yes, actually when we did our research
- 11 over the past six months on this issue that's when, to our
- 12 horror, we also discovered that and said we would like to
- 13 know where that got changed. However, when you are in the
- 14 community and you look at what was actually brought forth
- 15 from the staff into the project plan and to us then became
- 16 binding, they only brought forth a limit of the 45ft. So
- 17 would like to obviously look at (overspeaking).
- 19 VICE CHAIR PERDUE: So let me, but brought forth what,
- 20 let me take it one, I have to go sort of one step at a time,
- 21 bear with me. So to the extent one thought that the 45ft
- 22 limit came from this chart that was on the signature set.
- MS. PRESLEY: The project plan.
- VICE CHAIR PERDUE: No, this was on the signature set
- 25 for the site plan. It's from the site plan.

- MS. PRESLEY: Sorry, our interpretation though too was
- 2 that this actually derived from the initial project plan as
- 3 the data sheet described.
- 4 VICE CHAIR PERDUE: Right, but it was associated, it's
- 5 the signature set with the site plan, so it's the later
- 6 document in time and in my, sorry to the later document in
- 7 time that's been pointed out has heights limit in it
- 8 including height limits for townhouses. So I was trying to
- 9 understand, is it your position that these height limits
- 10 that are given for townhouses don't apply or that all those
- 11 townhouses are in violation including, maybe some of the
- 12 ones that people here live in?
- MS. PRESLEY: Including potentially some of us here
- 14 present.
- VICE CHAIR PERDUE: With respect to those townhouses,
- 16 what is your position, are they violations also?
- MS. PRESLEY: If in fact these definitions 35ft and
- 18 45ft are as we see them part of the project plan and
- 19 preliminary plan.
- 20 VICE CHAIR PERDUE: These are part of the site plan
- 21 which is the pre-empting document.
- MS. PRESLEY: Yes, then even then so more so then, then
- 23 I would also ask what is the answer to that? And I would
- 24 (overspeaking)

- 1 VICE CHAIR PERDUE: No, I was asking you whether your
- 2 position is that you (overspeaking).
- 3 MS PRESLEY: Yes I believe, my position is, but I can
- 4 say to you that we did not research in detail with a focus
- 5 on the townhouse. What we did was saw a building that came
- 6 to our attention and that was my point in making
- 7 clarification between townhouses that seemed compatible so,
- 8 but you are asking me now if I have to make one statement
- 9 yes or no, I would say based on these documentations yes,
- 10 that they also were in violation.
- 11 VICE CHAIR PERDUE: Okay.
- MS. PRESLEY: I just might want to add to the record we
- 13 have documents that we have submitted, I think the board has
- 14 reviewed over a period of time, and we are citizens. We
- 15 have had to take this to the extreme of obviously learning
- 16 at this point what we feel truly are the ins and outs of the
- 17 planning process. Initially we had documentations of things
- 18 we had no knowledge of, such as saved for another hearing,
- 19 set back issues that we also too have come across, but being
- 20 individuals making this kind of a second and third job has
- 21 been a very difficult process and only one which we have
- 22 been able to follow because we are so passionate about what
- 23 the master plan and project plan call for.

- VICE CHAIR PERDUE: But if those are violations then
- 2 those homes that you live in might also be whatever the
- 3 sanction is.
- 4 MS. PRESLEY: Whatever the sanction is, correct. I
- 5 mean, well as someone has expressed we have met with each
- 6 meeting that we have had either with staff or in letter we
- 7 have not asked for people to be moved out of their homes,
- 8 what we are expecting is that a violation is acknowledged as
- 9 a violation because if developers can walk out of here today
- 10 and say we didn't really violate we can twist the language
- 11 however we want.
- 12 CHAIRMAN BERLAGE: Let me ask a follow-up of staff. My
- 13 reading of the materials is that if the complainants theory
- 14 is correct, there are two buildings already built that
- 15 violate their site plans and three buildings yet to be built
- 16 which if built in excess of the indicated heights, they
- 17 would also be a violation. Is that a fair statement?
- MS. WITTHANS: Actually, of the three remaining
- 19 buildings, one was in my video that was completely framed
- 20 out and the insulation was put on so it's (overspeaking).
- 21 CHAIRMAN BERLAGE: So it's essentially up. So we are
- 22 at just...
- MS. WITTHANS: Two unbuilt.
- 24 COMMISSIONER WELLINGTON: Two unbuilt, okay.

- 1 CHAIRMAN BERLAGE: So there I mean the issue here is
- 2 first of all that if there is a violation found there are
- 3 three existing buildings that are in violation and there are
- 4 two buildings yet to be built for which the remedy
- 5 presumably would be don't violate.
- 6 COMMISSIONER ROBINSON: Plus all the townhouses of
- 7 course, may also be in violation.
- 8 MS. PRESLEY: Do I have any time to make one other
- 9 point?
- 10 CHAIRMAN BERLAGE: Well no, as I said the testimony was
- 11 concluded so now we are just going to have folks answer
- 12 questions from the Commissioners. Anymore questions?
- 13 COMMISSIONER WELLINGTON: Well, I guess I would ask
- 14 staff a couple of questions. What do you make of the
- 15 signature set document? I mean, and the other thing I want
- "16 to ask about it's not just the heights but the rest of it,
- 17 that lot area and square feet, front yard minimum, I mean
- 18 you know if I weren't a Commissioner, if I were just, well I
- 19 am just a regular person who happens to be a Commissioner
- 20 but I was reading this I would be thinking this is what they
- 21 are going to do, this is going to be the rear yard minimum,
- 22 the side yard minimum, is that what you think, is that how
- 23 staff understands the signature set, or?
- MS. WITTHANS (STAFF): Yes, these, what we, the sum
- 25 total of the signature set relies on a few different pieces

- l of information. It relies on the opinion which sites the
- 2 Staff Report where much of the project is described deeply
- 3 and we have a site plan data table which takes what the
- 4 developer has done and puts it into our format or context
- 5 for the approval and the planning board reviews that and
- 6 there all the development standards are what they are.
- 7 That's were we, you know on three different occasions, have
- 8 brought before site plans that said four stories for
- 9 example. Then the projects also include the drawings that
- 10 have the location of the units and in this case since the
- 11 architecture for the first site plan was schematic for 8-
- 12 98001 it was schematic, we did not have detailed
- 13 architecture. For later amendments we had more detailed
- 14 architecture, and this is in response to Commissioner
- 15 Robinson.
- 16 COMMISSIONER ROBINSON: What kind of detail? Did you
- 17 actually have elevations?
- MS. WITTHANS (STAFF): We had elevations, we had
- 19 (inaudible) when the B amendment for Phase One was approved,
- 20 it was a staff level amendment that came out, I am getting
- 21 off track actually and I wanted to just complete the
- 22 signature set.
- 23 COMMISSIONER ROBINSON: No, you are right on track,
- 24 please continue.

- 1 MS. WITTHANS (STAFF): Okay. Have I satisfied you and
- 2 so it's the development standards that are presented in
- 3 there.
- 4 COMMISSIONER WELLINGTON: Well did you answer about the
- 5 signature set as to how you do that? Yes, so those are what
- 6 you would be expecting they are going to build to those
- 7 standards.
- 8 MS. WITTHANS (STAFF): Correct, except in this case the
- 9 building heights on the chart did not reconcile with what
- 10 was in the drawing. The drawing listed four-story
- 11 buildings.
- 12 COMMISSIONER ROBINSON: And didn't tell us the heights.
- MS. WITTHANS (STAFF): And didn't tell the height but
- 14 you know we -
- 15 COMMISSIONER WELLINGTON: But it did, that does comply
- 16 with the project plan that also said four stories and it
- 17 said 45ft.
- MS. WITTHANS (STAFF): In our opinion, that's correct.
- 19 Also the Staff Report cited four stories. So we had two
- 20 different pieces of information that said four stories. We
- 21 had a chart in the back, we have a lot of information thrown
- 22 at us with these plans. This project plan set had over,
- 23 probably had forty drawings in it so (overspeaking).
- 24 COMMISSIONER WELLINGTON: Well, I know but we do assume
- 25 that we have command over the information that we are given

- l right, and then you would go from the general to the
- 2 specific to have your most specific and precise
- 3 understanding of what's going to be built.
- 4 COMMISSIONER ROBINSON: However the project plan did
- 5 have the guideline of 45ft and 50ft and we are looking at
- 6 site plan drawings here that have that specific site plan
- 7 tables that have 45, 50ft built into them, right?
- 8 MS. WITTHANS (STAFF): Except none of the, what the
- 9 planning board saw and the data tables that were presented
- 10 with each of the Staff Reports brought before you said four
- 11 stories, they never said 45ft.
- 12 . COMMISSIONER ROBINSON: But the problem I have with
- 13 that is, and I put that to the staff again, is I can accept
- 14 the theory that there is an overall general guidance and
- 15 then you move to something with greater specificity, but we
- 16 have to make a compatibility finding, right. Compatibility
- 17 with the master plan, compatibility with some, this concern
- 18 about the history of the town center, compatibility finding
- 19 also goes to, you know, well you know, it's just really
- 20 looks like it's a good place to live, and the problem I have
- 21 which is saying four stories is that there is a major flaw
- 22 there, because those four stories could be eighty feet, it
- 23 could be one hundred feet. Now, I know that's an
- 24 exaggeration but we are talking about here about the
- 25 integrity of a record, we are talking here about community

- l expectations, and we know from our problems at Bethesda, and
- 2 other places, there is no more sensitive, there is two
- 3 sensitive issues in the belt, the two most sensitive issues,
- 4 other than traffic, are density and building height. So
- 5 essentially the plan comes in and essentially says some
- 6 vague idea of four stories and we look at it and see four
- 7 stories and then we might have an expectation in the
- 8 different Commissioners of what four stories is. To me a
- 9 story in a residential structure is at the most 10ft plus
- 10 the roof, so it's about 40, 45, 46ft because that's ten,
- 11 nine, ten feet for a story to allow for the mechanicals, the
 - 12 gentleman pointed out, if you wanted to go by two by sixes,
 - 13 I know I am getting into detail here but since I have been a
 - 14 builder, these things mean things to me, which is a story is
 - 15 and the concept of a loft which adds on half a story, which
 - 16 is in essence creating room for a step-up bedroom. That
 - 17 surprises me as a matter of community expectation. As a lay
 - 18 person, unless that's pointed out to me by a schematic, I
 - 19 would not expect that there be one and a half stories there.
 - 20 So my concern is about what was actually before the board in
 - 21 terms of how is this vague concept of a story going to be
 - 22 bounded in some reasonable way. Now, I am not necessarily
 - 23 saying that I think that there was a violation here, I am
 - 24 trying to find out in this paper trail how we get the
 - 25 community expectations, board expectations and developer

- 1 expectations, particularly when the site plan says 45ft and
- 2 50ft. You know that's a regulatory document with a limit
- 3 built into it.
- 4 MS. WITTHANS (STAFF): After 1998 there was about a
- 5 two-year hiatus of development in Clarksburg. Developer
- 6 number one sold to developer number two, and in that time
- 7 the second developer was building buildings. They were
- 8 getting builders out there and they were far more detailed
- 9 in their development of the plans.
- 10 COMMISSIONER ROBINSON: What did they bring in, that
- 11 second phase, what were they bringing in?
- MS. WITTHANS (STAFF): For second phase, in particular
- 13 for the buildings that you see today, they brought us more
- 14 staff, more detailed review of the architecture.
- 15 COMMISSIONER ROBINSON: Okay, tell me what's in those
- 16 details. Did you have, was there presented in the record an
- 17 elevation so that when you do a condominium downtown in the
- 18 district you have to have an elevation that shows a) the
- 19 base height and the top of the building, that's and the
- 20 height of each unit. That's one of the obligatory elements
- 21 of a condominium document. Now did we get anything like
- 22 that, at least an architectural drawing or a schematic that
- 23 shows that, without regard to the base you know well, is it
- 24 X feet above the ground level and all that stuff, it's

- l idiosyncratic, did we get anything in the record that says
- 2 from the slab to the peak it's going to be X feet?
- 3 MS. WITTHANS (STAFF): We did get more detail on the
- 4 multi-family buildings from the builder for the buildings
- 5 that you see now. The reason I am hesitating a bit is that
- 6 once the buildings are built we clean out our files and we
- 7 don't have that particular building any longer. What can I
- 8 say we try to reduce our paperwork and clarify you as
- 9 (overspeaking).
- 10 VICE CHAIR PERDUE: So, let me ask what would be
- 11 customary, what would be, what sort of documentation would
- 12 you expect to have seen. I really don't have the files so.
- MS. WITTHANS (STAFF): Sure, it's an elevation and it
- 14 shows the general appearance of the façade of the building,
- 15 and the general height of the building.
- 16 VICE CHAIR PERDUE: So that would be -
- MS. WITTHANS (STAFF): That would be at a schematic
- 18 level that we would have that.
- 19 VICE CHAIR PERDUE: Okay, I mean here's what I see in
- 20 this very messy record is a project plan that says "the plan
- 21 as proposed had a 45ft maximum". That was as proposed,
- 22 that's in that table, and then there is a finding that as
- 23 proposed the plan is consistent with the requirements of the
- 24 zone. Then we get a site plan that in the Staff Report and
- 25 in the board findings says nothing specific as to height.

- l Would that be accurate, that at the site plan there is no
- 2 specific, at the board stage I realize, I am going to get to
- 3 the signature set, just at the board stage there is silence
- 4 in the Staff Report about height, there is silence in the
- 5 opinion as to height, there is a general finding of
- 6 conformance with the project plan but no, there is simply
- 7 silence about height. Now, and then we get a signature set
- 8 that does on the back of it show heights. Now we make a
- 9 couple of observations about each of those stages. At the
- 10 project, there is nothing irrational about saying four
- 11 stories, but not to exceed 45ft, or not to exceed 200ft or
- 12 not, there are occasions when we impose both story limits
- 13 and height limits, that's not unthinkable.
- 14 COMMISSIONER ROBINSON: Agree.
- 15 VICE CHAIR PERDUE: There are occasions when we don't
- 16 impose height limits. So, the fact of a height limit is not
- 17 inconsistent with the fact that the story limit is not.
- 18 inconsistent with also having a height limit. Then we get
- 19 to the site plan, at site plan the silence is, there are a
- 20 number of consistent possibilities. We meant to carry out,
- 21 we, the board, meant to carry over 45ft. The board thought
- 22 that a story limit was adequate to protect. One could have
- 23 had a board say four stories but it can go as high as 50ft
- 24 because now we have thought about it and that any of those
- 25 things would be possible, any of those things are, well they

- l clearly didn't do the latter because that's not in the
- 2 record, it says silence, and we can draw that they meant to
- 3 carry over 45ft, they just didn't think about it, we just
- 4 have ambiguity, and I don't think there is any way around
- 5 that. Now we can say we can have rules of interpretation as
- 6 to what we ought to do with the ambiguity but I think we
- 7 just flat out have ambiguity. Then we get, and the
- 8 ambiguity I think it's worth noting the ambiguity, well we
- 9 also get it with the townhouses, with 35ft on the
- 10 townhouses. The developer then has his, we have amendments
- 11 and plans that are reviewed by staff, with some degree of
- 12 detail, and we don't know quite how much detail, but they
- 13 get approved by staff. They get building permits. I am
- 14 assuming that these buildings that are built are consistent
- 15 with the building permits, nobody has told me otherwise than
- 16 that. Maybe I had better hear from the developer. Are
- 17 these buildings...? Can somebody give them a seat. Barbara
- 18 do you want to tell me, are these buildings consistent.
- MS. SEARS: Sure at the moment a family receives
- 20 occupancy from this and that's a finding of the occupancy.
- 21 VICE CHAIR PERDUE: I am sorry can just can you repeat
- 22 that into the microphone.
- MS. SEARS: Yes, the building permits, the buildings
- 24 that are multi-family buildings receive occupancy permits, a

- 1 finding of the occupancy permit before it's granted is that
- 2 it complies with the requirements.
- 3 VICE CHAIR PERDUE: Of the building permit, is that
- 4 true for townhouses also?
- 5 MS. SEARS: For townhouses I don't know that you get an
- 6 occupancy permit.
- 7 COMMISSIONER ROBINSON: Yes, you have to get an OC for
- 8 a townhouse and if the OC is issued it's conclusive that it
- 9 complies with the requirements, the plans in the absence of
- 10 fraud.
- 11 VICE CHAIR PERDUE: Okay, so we have had a lot of
- 12 townhouses that have gotten occupancy permits that are
- 13 taller than 35ft. We have multi-families that have gotten
- 14 occupancy permits that are taller than 45ft. So at some
- 15 point along the way it's clear that staff's understanding
- 16 was that it was not limited by 35 and 45 and that that's the
- 17 builders understanding. Other than that it's, we have a
- 18 very ambiguous record. I don't think there is evidence
- 19 given what's clearly staff's understanding and a developer
- 20 operating consistent with that, I don't see any evidence of
- 21 fraud or deceit or somebody doing something underhanded, we
- 22 have been showing plans to Staff, they have been going to
- 23 the planning agency.
- 24 COMMISSIONER WELLINGTON: Is that an element?
- 25 (overspeaking).

- l VICE CHAIR PERDUE: No, no but I just think so now
- 2 we've got a site plan that is silent, was silent before the
- 3 board on height as far as we can tell.
- 4 COMMISSIONER WELLINGTON: Well we don't have the whole
- 5 record.
- WICE CHAIR PERDUE: As far as we can tell, we have
- 7 nothing in the record one way or the other about
- 8 (overspeaking).
- 9 COMMISSIONER ROBINSON: Well I think I would like to
- 10 ask counsel about that.
- VICE CHAIR PERDUE: And then we get numbers, so we
- 12 have, do you have any?
- 13 COMMISSIONER ROBINSON: We have a problem with that we
- 14 don't know what the record is so I was going to ask the
- 15 Counsel on "what do you have in your wallet?"
- MR. BROWN: Not much. If I could just address the
- 17 question Commissioner Perdue has, the point that she was on,
- 18 both Staff's report, 98 Staff Report for Phase One and the
- 19 02 Staff Report for Phase Two had data tables in those Staff
- 20 Reports, and both of those data tables say four stories and
- 21 that's what was put before the board.
- VICE CHAIR PERDUE: But they all say four stories, they
- 23 are silent as to height. There isn't a point at which it
- 24 says, and by the way we think 50ft is okay, which would have
- 25 been a perfectly plausible thing for a report to say, or it

- 1 could have said "and by the way that 45 is in violation".
- 2 It could have said either things, it's just silent.
- 3 MR. BROWN: It could have but it did not.
- 4 COMMISSIONER BRYANT: May I ask a question at this
- 5 point, a point of clarification, because I love your
- 6 analysis, it's like being in one of your classrooms from
- 7 that standpoint and a student has just (overspeaking).
- 8 CHAIRMAN BERLAGE: Times like this we most appreciate
- 9 it.
- 10 COMMISSIONER BRYANT: And the student who is in the
- 11 back has just squashed him. Based upon the response to the
- 12 questions M. Perdue is asking and the notion that we all
- 13 agree that there is silence, the question I have is-
- 14 COMMISSIONER WELLINGTON: Well not all of us, no. But
- 15 go ahead, I'm sorry.
- 16 COMMISSIONER ROBINSON: It's also expectations.
- 17 CHAIRMAN BERLAGE: Mr Bryant.
- 18 COMMISSIONER BRYANT: I'll have to watch myself. The
- 19 question I have is do we not when we say four story depend
- 20 on the zone and what the criteria is for a particular zone
- 21 if you are in fact are approving a document that's coming
- 22 through and it says it's going to be four stories, whether
- 23 you have a chart, I am not saying you ignore the chart but
- 24 if in fact you say something is four stories, does not the

- zone prescribe what a structure, how tall a structure can
- 2 be.
- 3 MS. WITTHANS (STAFF): In the RMX2 zone there is no
- 4 height limit.
- 5 COMMISSIONER BRYANT: There is no height limit.
- 6 COMMISSIONER ROBINSON: By definition of a story.
- 7 COMMISSIONER BRYANT: I have been so patient. But it
- 8 gets to what Commissioner Robinson is saying and that is do
- 9 we not have a definition of what a story is because we have
- 10 that because you tried to make a distinction between a
- 11 story, between a basement and between a cellar, etc. etc.,
- 12 so in the definition of story regardless of what the
- 13 particular height is at this point, does in fact the plans
- 14 meet the definition of story?
- MS. WITTHANS (STAFF): They do.
- 16 COMMISSIONER BRYANT: They do, okay. So the definition
- 17 of story is met. The fact that it is silent is, and I know
- 18 that you already said Ms. Wellington is that a criteria or
- 19 is that a factor that is being stated? So therefore it is
- 20 not a situation where we have been duped. Those are the
- 21 questions I just wanted to ask.
- 22 COMMISSIONER ROBINSON: Well, I think I'd like to ask a
- 23 follow-up question because it goes right to the core of the
- 24 case I would like to have a definition of a story read into
- 25 the record, I believe our Counsel has that definition and I

- l believe that there is a maximum height for a story, and it's
- 2 not 20ft that's obviously being a hyperbola for the record.
- 3 MS. ROSENFELD (LEGAL STAFF): A story "that portion of
- 4 a building included between the surface of any floor and the
- 5 surface of the floor next above it or, if there be no floor
- 6 above it, the space between such floor and the ceiling next
- 7 above. A basement is counted as a story. A mezzanine floor
- 8 shall be counted as a story if it covers more than one third
- 9 of the area of the floor next below it or if the vertical
- 10 distance between the floor next below it and the floor next
- 11 above it is 20ft or more".
- 12 COMMISSIONER ROBINSON: So what's the height of the
- 13 story, maximum height of the story, under the zoning code.
- MS. ROSENFELD (LEGAL STAFF): This definition does not
- 15 include a maximum limitation of a height for a particular
- 16 story, it does include a maximum square footage ratio for a
- 17 mezzanine floor and our staff testified earlier that these
- 18 mezzanines conform with that definition.
- 19 COMMISSIONER ROBINSON: Okay, is there any technical
- 20 definition of a story, like 10ft, 12ft, 15ft?
- 21 MS. ROSENFELD (LEGAL STAFF): Not in the Zoning
- 22 Ordinance.
- 23 COMMISSIONER ROBINSON: Not in the Zoning Ordinance.
- 24 So the only bounds that could be put on a story are those
- 25 that we might impose, either at project plan or at site

- l plan. In the exercise of our informed discretion on issues
- 2 of compatibility with the zone and the requirements of the
- 3 RMX Zone, is that correct?
- 4 MS. ROSENFELD (LEGAL STAFF): That would be correct.
- 5 COMMISSIONER BRYANT: I do have another question.
- 6 CHAIRMAN BERLAGE: Are you done Commissioner Robinson?
- 7 COMMISSIONER ROBINSON: For the time being, yes.
- 8 CHAIRMAN BERLAGE: Mrs. Wellington, do you have?
- 9 COMMISSIONER WELLINGTON: Well, he has another question
- 10 then I can...
- 11 COMMISSIONER BRYANT: Yes, just one more question and
- 12 that relates to the period after we have approved site
- 13 plans, etc. the various plans. When we approve those plans,
- 14 are they being approved with the idea in mind that staff is
- 15 the empowered if there is a minor amendment that staff can
- 16 exercise the authority to modify if it's minor amendments?
- MS. WITTHANS (STAFF): Yes.
- 18 COMMISSIONER BRYANT: Okay. Is there a definition or
- 19 criteria that's used to determine when something is minor
- 20 versus major. What is the basis of that?
- 21 MS. WITTHANS (STAFF): In the Zoning Ordinance, I am
- 22 sure Counsel has the exact passage, but if it doesn't
- 23 materially change the Planning Board's approval, and what we
- 24 look to is the, of course the Staff Report, the opinion and
- 25 in this case it would have been indeed a table.

- COMMISSIONER ROBINSON: So there's no definition of
- 2 what the height is, there is nothing to measure materiality,
- 3 because four stories is absolute, you know basically floor
- 4 to ceiling materiality would only be measured in terms of
- 5 the height and there is no reference in the things that we
- 6 approved.
- 7 MS. WITTHANS (STAFF): In this case we used four
- 8 stories.
- 9 MS. SEARS: Can I make a, one or ask a question.
- 10 CHAIRMAN BERLAGE: Ah no, we are sticking with board
- 11 members questions right now.
- 12 COMMISSIONER WELLINGTON: So we are waiting for an
- 13 answer about.
- 14 CHAIRMAN BERLAGE: Is there a question pending?
- 15 COMMISSIONER ROBINSON: Well there is a question about
- 16 materiality and in terms of a minor amendment materially is
- 17 normally 10% more but.
- 18 COMMISSIONER WELLINGTON: Yah, what is the definition
- 19 of a minor change or, well I -
- 20 CHAIRMAN BERLAGE: Who want's to try and answer, we
- 21 will start with our staff to see if they want to answer
- 22 that.
- MS. ROSENFELD (LEGAL STAFF): You are asking what's the
- 24 definition of a minor amendment?

- 1 COMMISSIONER BRYANT: What constitutes a minor versus
- 2 major, or another way of asking, at what point does staff or
- 3 is staff required to bring something back because it
- 4 represents a major modification to what's been approved.
- 5 MS. ROSENFELT (LEGAL STAFF): There is a definition in
- 6 59(d)2.6 Minor Plan Amendment, "a minor amendment is an
- 7 amendment that does not alter the intent, objectives or
- 8 requirements expressed or imposed by the board in its review
- 9 of the plan".
- 10 COMMISSIONER BRYANT: Now with that definition in mind
- Il I am now speaking to Ms. Witthans. If in fact a building is
- 12 a four-story building exceeds 45ft and goes up to 50ft would
- 13 that be a substantial modification to the building?
- MS. WITTHANS (STAFF): If the approval was for 40ft?
- 15 COMMISSIONER BRYANT: Yes, if it were specifically
- 16 approved for 40ft then it would you are saying.
- 17 MS. WITTHANS (STAFF): If it was, yes.
- 18 COMMISSIONER BRYANT: But in light of the fact that
- 19 there was no specific delineation of height, would as an
- 20 applicant are brought back to you a plan that shows that the
- 21 chart has gone from 45ft, 48ft or to 50ft, would you
- 22 consider that minor or major, if we are only talking about
- 23 height.
- 24 MS. WITTHANS (STAFF): If the original approval was for
- 25 45ft.

- 1 COMMISSIONER BRYANT: No, if the original approval was
- 2 for four stories.
- 3 MS. WITTHANS (STAFF): Four stories, oh, and if I would
- 4 use as my criteria the number of stories in the building.
- 5 COMMISSIONER ROBINSON: Okay, so that's what you would
- 6 be looking for, to see if there has been a modification to
- 7 the number of stories.
- 8 MS. WITTHANS (STAFF): Correct.
- 9 COMMISSIONER BRYANT: Okay, thank you that's helpful
- 10 for me.
- 11 CHAIRMAN BERLAGE: I have a question I would like to
- 12 pose to Ms. Presley because today's proceeding is not about
- 13 whether we are happy with the way Clarksburg is turning out
- 14 or not, we are happy about some of it, we are not entirely
- 15 happy about other aspects. It's not about whether our
- 16 process is perfect or our paper trail has been perfect,
- 17 clearly it has not been. It's about whether the site plans
- 18 have been violated. It's about whether there is any
- 19 violation of law and like any violation of law, to establish
- 20 that, the burden is on the person trying to establish that
- 21 the law has not been followed, and that is you and your
- 22 organization. And because the burden is on you, if the
- 23 facts and the evidence are ambiguous, maybe the site plan
- 24 was violated, maybe it wasn't, you've got to argue both
- 25 sides of the question, if it's ambiguous unfortunately for

- 1 you, you lose because you have not established a clear
- 2 violation of law. So I want to give you a minute or less,
- 3 you have heard this whole discussion, what is your best
- 4 argument as to why there is a clear, unambiguous,
- 5 unavoidable violation of a site plan in this record.
- 6 MS. PRESLEY: Number one, I will just start with the
- 7 minor amendment aspect, if there were any call for a minor
- 8 amendment, there is no notation anywhere in any files, an
- 9 records, anything, so if in fact there was a reason that to
- 10 approve the buildings at the height they are, that there
- 11 would need to be an amendment to do that, that doesn't make
- 12 sense, well why do staff talk about it was a minor amendment
- 13 or something that happened later, we shouldn't have to
- 14 justify that because the project plan specifically stated
- 15 45ft. That's the limit. That was included. The board
- 16 itself, that's the language of Condition 14. I can't
- 17 understand why we are going back to zoning because zoning
- 18 was taken into consideration when that document was
- 19 approved. That's in argument number one. Argument number
- 20 two is that some of the submission of the site plan that
- 21 went before this board had a revised or reconstructed data
- 22 table. That needs to be addressed as well because the data
- 23 table that was attached to the Planning Board's finding in
- 24 the project plan was different and specifically called out
- 25 45ft. Now if I were the board and I had something come

- l through to me for approval and I saw a data table that said
- 2 45ft and nothing on the site plan, then I would have to ask
- 3 the question "why?", and it continues to the citizens to
- 4 look like things are in someway deliberately set up
- 5 ambiguously, but I do not see how we can get around what is
- 6 already approved by the board, prior to the site plan
- 7 hearing. It's right there, stated in the records and then,
- 8 even in the site plan documentation, the developer himself
- 9 submits 45ft and 35ft. Where can we possible say that it's
- 10 okay then to do whatever you choose when it comes time to
- 11 construction.
- 12 CHAIRMAN BERLAGE: Okay.
- COMMISSIONER WELLINGTON: May I, my turn. Well you
- 14 speak quite eloquently actually. I think there isn't the
- 15 kind of ambiguity that would say that on the one hand, on
- 16 the other hand and therefore the person with the burden
- 17 loses because basically the table on the signature set, the
- 18 very final document, the document that everybody relies on
- 19 when they are finally going to start building, that and of
- 20 course the table that's contained both in the opinion of the
- 21 Planning Board with the 45ft limit and in the Staff Report
- 22 that's part of that opinion that has, that incorporates the
- 23 same development standards and includes the height limit.
- 24 What's hard about this case, for me at least, is not whether
- 25 there was a violation because when we can play inside

- l baseball and who looked at what plan and what the developer
- 2 thought, but this is a public process and you all relied on
- 3 public documents that were the appropriate things to be
- 4 looking at. That's why we do them and we also do them so
- 5 that things will turn out the way we planned them to be, and
- 6 that's why people sign off on them, they have committed to
- 7 .it. So what's tough about this is what does this mean for
- 8 the future and what does this mean for the buildings that
- 9 have already been built. It's not a simple situation and
- 10 it's one where, we will have to go back I guess to the
- 11 wisdom of Solomon and think very hard and long about what
- 12 would be fair here and I have been thinking about it and my
- 13 colleagues are people who also think in very fair terms and
- 14 I am sure they have been thinking about it too and I
- 15 certainly start from the proposition of the buildings that
- 16 haven't been built yet and my concerns about them.
- 17 As far as I am concerned these documents do speak for
- 18 themselves and I think particularly as professional
- 19 planners, they would be more likely to understand what the
- 20 heights are and the plans and all, than the average citizen.
- 21 So, and what should have happened, there should have been an
- 22 amendment, I mean it's very obvious, and the amendment is
- 23 very likely to have been granted. I mean let's be honest,
- 24 that very likely is what would have happened because these
- 25 are good housing prototypes, they have been built before,

- 1 there are problems though with how they fit in with a
- 2 historic district, but there would have been an amendment,
- 3 everybody would have had a chance to speak on it, but there
- 4 wasn't. So for me I think that we should adhere to the
- 5 building heights, once they want to come in for an
- 6 amendment, can always come in for an amendment, I mean
- 7 that's what our public process is all about, for the
- 8 buildings that haven't been built, and for the ones that
- 9 have been built, I will hear from other people but I would
- 10 think about other kinds of remedies, either landscaping or
- 11 amenities that could increase the compatibility with the
- 12 existing buildings because for better or for worse they are
- 13 not perfect, they are not in compliance, they are not as far
- 14 as I am concerned in compliance with our site plan, but they
- 15 are there and I would not ask them to lop off a story or
- 16 change the mezzanine to something else, I would go on from
- 17 here and work out the future of the next part of Clarksburg
- 18 to bring this in compliance with our standards.
- 19 COMMISSIONER ROBINSON: Well I am still confused.
- 20 Assuming that we've got the table on the site plan, which is
- 21 pretty compelling evidence of what the board sub solantio
- 22 intended because that's the signature set and you must
- 23 comply with the signature set, it's a matter of law that's
- 24 required. How many buildings does that display in front of
- 25 us that actually has the 35 or 45ft limitation on it. How

- 1 many buildings does that apply to? All the buildings that
- 2 are the subject of this complaint, or only some of them?
- 3 MS. WITTHANS (STAFF): The chart that I was given by
- 4 the developer refers to all the townhouses by these
- 5 builders. The townhouses are in orange on this drawing,
- 6 they are in orange. The single families are in yellow and
- 7 the purple are the manor homes. So the orange are the
- 8 townhomes.
- 9 COMMISSIONER ROBINSON: And all of those are in excess
- 10 of 35ft. And all of those are subject to that 35ft
- 11 limitation.
- MS. WITTHANS (STAFF): Yes. If I go by the chart that
- 13 the developer gave me.
- 14 COMMISSIONER ROBINSON: Alright now let's move on, what
- 15 about the multi-story buildings, same question. 45ft
- 16 limitation, how many of the buildings that are subject to a
- 17 complaint are arguably covered by the 45ft limitation in the
- 18 site plan? All the buildings that were built and the ones
- 19 to be built as well?
- 20 MS. WITTHANS (STAFF): The four-story buildings in the
- 21 same plan are in red, here. There are five four-story
- 22 buildings.
- 23 COMMISSIONER ROBINSON: And they are arguably subject
- 24 to that site plan limitation?
- MS. WITTHANS (STAFF): The site plan says four stories.

- COMMISSIONER ROBINSON: That one says site plan, says
- 2 45ft.
- 3 MS. WITTHANS (STAFF): No, the project plan.
- 4 VICE CHAIR PERDUE: What is this document?
- 5 COMMISSIONER ROBINSON: What does the signature set
- 6 apply to?
- 7 COMMISSIONER WELLINGTON: Which buildings?
- 8 MS. WITTHANS (STAFF): The chart you are referring to
- 9 was on the first site plan and as I had indicated earlier,
- 10 the drawing, the buildings themselves were labelled as four
- 11 stories and that's in your packet as well. What we had was
- 12 information that didn't reconcile.
- VICE CHAIR PERDUE: Wait that doesn't work, four
- 14 stories and a drawing that says four stories is not
- 15 inconsistent with the 45ft limit. Alright, so let's just
- 16 put that aside at the moment. As to what real estate did
- .17 this chart apply?
- MS. WITTHANS (STAFF): It applied to the First Phase.
- 19 COMMISSIONER ROBINSON: Right, so it is possible that
- 20 the Second and Third Phase had a different approval standard
- 21 because they didn't have specific sites.
- MS. WITTHANS (STAFF): The Second Phase, the data table
- 23 on the site plan drawing did not indicate a height.
- 24 COMMISSIONER ROBINSON: And what about the signature
- 25 sets?

- 1 MS. WITTHANS (STAFF): Did not indicate a height. The
- 2 data table in the Staff Report again listed the four
- 3 stories. Alright, so there are two sets COMMISSIONER ROBINSON: 4 of issues here. There is the First Phase where there is 5 specific height limitations on the signature set, and there 6 is Phases Two and Three where there are no such limitations 7 8 on the signature set. Now the signature set is a very strict regulatory document because when you come in with a 9 signature set we look at that very carefully and we make 10 sure that every tree and every plant and every flower and 11 every brick is just what we said in the site plan documents, 12 sign here, strict compliance unless you can get a specific 13 minor amendment or a major amendment from the board. So we 14 have two categories of real estate. We have Phase Two and 15 Phase Three, whereas Commissioner Perdue has pointed out, 16 there is blatant disturbing and aggravating ambiguity but it 17 is ambiguous, there are no limitations imposed in those 18 documents. And since there is no legal definition on a 19 story, it's very possible yes that each of those stories 20 could have been 20ft high, that's my hyperbole for purposes 21 22 of argumentation, I don't think that even we would have done something like that, you know I think we would have picked 23 24 it up and done something, so, it's very hard on this record to find that there is a violation in Phases Two and Three 25

- 1 from my point of view because we didn't impose any
- 2 limitations on the developer. We said in that Phase we said
- 3 four stories, no limitations in the Staff Table, no
- 4 limitations on the signature set and it is possible that the
- 5 concept of compatibility would have evolved from the first
- 6 set to the second set and the project plan. Yeah, it would
- 7 have been much better in terms of community expectations
- 8 that we deal with height explicitly at every phase and I
- 9 assume in the future we clearly will.
- 10 COMMISSIONER WELLINGTON: Well, because the project
- 11 plan applied to all the Phases.
- 12 COMMISSIONER ROBINSON: It applies to all the Phases,
- 13 but when you go to site plan you can go to revisions after
- 14 hearing. A site plan has a hearing and so things do evolve.
- 15 The project plan is general expectations, the site plan is
- 16 specific expectations and if I had the world to do over
- 17 again, there would be a specific limitation on height in
- 18 each site plan, but we didn't do that, so Two and Three is
- 19 very hard to find a violation.
- VICE CHAIR PERDUE: Can I get some clarity. Let me
- 21 make sure I understand that sort of, which real estate does
- 22 it apply to. In Phase One, the signature set...
- MS. WITTHANS (STAFF): This is the only building in
- 24 Phase One, the other four are in Phase Two.

- 1 VICE CHAIR PERDUE: Okay, so there is one building,
- 2 well then the townhouses but and there are townhouses in
- 3 Phase One as well that are maybe too tall.
- 4 MS. WITTHANS (STAFF): Over 35ft. They are under four
- 5 stories.
- 6 COMMISSIONER WELLINGTON: But I mean where are they on
- 7 the map, they are in that same little dotted area.
- 8 VICE CHAIR PERDUE: Okay, in Phase One, are there
- 9 buildings yet to be built in Phase One. Is Phase One built
- 10 out?
- MS. WITTHANS (STAFF): This building is in Phase One,
- 12 these buildings are not yet built out.
- MS. SEARS: I think Phase One was recently amended and
- 14 that would then make the Phase One, if I understand it, the
- 15 chart on Phase One irrelevant now because it was amended and
- 16 it included the manor homes so we have a new phase, approved
- 17 phase, it was amended and so would reflect I would assume
- 18 what was out there as well as the changes that were proposed
- 19 in the amendment that was recently granted.

- 1 COMMISSIONER ROBINSON: That's a retroactivity
- 2 argument, go ahead.
- 3 VICE CHAIR PERDUE: But that's a, I think it's helpful
- 4 to talk about these the real estate in pieces. Alright so
- 5 Phase One was amended. Does anybody have what we said in
- 6 the amendment to Phase One.
- 7 MS. PRESLEY: We have a copy of a drawing that I would
- 8 like to.
- 9 VICE CHAIR PERDUE: I want to know conditions, I want
- 10 to know about the language.
- MS. WITTHANS (STAFF): Phase One amendments were not,
- 12 they were Staff level amendments.
- 13 VICE CHAIR PERDUE: Okay, so that was done at staff
- 14 level, that didn't come before us, alright.
- 15 COMMISSIONER ROBINSON: What did you amend at the staff
- 16 level, follow the Commissioner's question, tell us exactly
- 17 what you amended at the staff level.
- MS. WITTHANS (STAFF): Okay, we some of the unit
- 19 locations changed. The blocks were essentially redesigned
- 20 and at the time Staff felt this was in conformance with
- 21 Condition No. 38 in the first site plan approval, and at the
- 22 first hearing we brought before the board the issue that we
- 23 anticipated changes in the buildings, at that first hearing
- 24 we acknowledge that the buildings as shown were schematic
- 25 and we recommended that we, and in Condition 38 we

- 1 recommended that staff be allowed to make changes that still
- 2 kept the major findings of the Planning Board and the
- 3 development standards.
- 4 COMMISSIONER ROBINSON: Okay the major findings were,
- 5 did you change the size of the block, the number of units to
- 6 the block, configuration of the block? Those are three
- 7 different questions. Size of the block, density of the
- 8 block, configuration of the block, did you change those by
- 9 amendment?
- 10 MS. WITTHANS (STAFF): The blocks changed a little bit
- 11 because they were table two, because of topography. What
- 12 was the second one?
- 13 COMMISSIONER ROBINSON: Density of the block.
- MS. WITTHANS (STAFF): The density of the block, there
- 15 are less units than there were for the first approval.
- 16 COMMISSIONER ROBINSON: Okay, so in terms of the
- .17 standards concerns that goes that way.
- MS. WITTHANS (STAFF): To be honest it go better.
- 19 COMMISSIONER ROBINSON: Alright, the third one, I have
- 20 forgotten my third question, does anybody remember.
- VICE CHAIR PERDUE: Okay, so we had staff level changes
- 22 for additional buildings, and the additional buildings that
- 23 were approved at the staff level changes, the manor
- 24 buildings.

- 1 MS. WITTHANS (STAFF): No the manor building
- 2 brought before you because by that time we, the
- 3 (overspeaking).
- 4 VICE CHAIR PERDUE: Are the manor buildings, the ones
- 5 that came before us, are they bigger than, are they taller
- 6 than 45ft. No.
- 7 MS. WITTHANS (STAFF): They were three stories. What's
- 8 the height? So a three-story building is 44.7.
- 9 VICE CHAIR PERDUE: Okay, so and I don't remember, I
- 10 just don't remember discussions about height.
- 11 . MS. WITTHANS: According to comments from the audience,
- 12 oh it's in the report.
- VICE CHAIR PERDUE: But the amendments to Phase One did
- 14 not come to us, did they involve anything with a building
- over, either a townhouse over 35 or a multi-family over 45.
- 16 COMMISSIONER WELLINGTON: It wouldn't have changed from
- .17 a four-story, it did not change from a four-story.
- 18 VICE CHAIR PERDUE: But it made it, but you all
- 19 approved an amendment that allowed it to go above 45 ft.
- MS. WITTHANS (STAFF): For the one multi-family
- 21 building.
- VICE CHAIR PERDUE: Okay, and you did that on the
- 23 theory that Condition 38 says "applicant may propose
- 24 compatible changes to units proposed as market conditions
- 25 may change provided the fundamental findings of the Planning

- 1 Board remain intact per ... regarding building type and
- 2 location, open space (not an issue), recreation and
- 3 pedestrian and vehicular circulation (not an issue),
- 4 adequacy of parking, no comma etc.
- 5 MS. PRESLEY: That's not the number 38 that was
- 6 approved by the board, that what was submitted. That was
- 7 when 38 was submitted the board's site plan approval with
- 8 that Condition 38 was rewritten to be very specific.
- 9 MR. BROWN: Excuse me Commissioner Perdue I have a copy
- 10 of the opinion here if you want it.
- VICE CHAIR PERDUE: I am sorry I was reading the wrong.
- 12 If somebody can find me.
- 13 CHAIRMAN BERLAGE: Can you let Commissioners talk, if
- 14 they have questions you can answer them but there is no
- 15 question pending yet.
- VICE CHAIR PERDUE: Counsel, can you tell me what the
- 17 binding condition, or else staff can you tell me what
- 18 condition.
- 19 MS. WITTHANS (STAFF): The opinion conditions for 38?
- VICE CHAIR PERDUE: Yeah, what page was it on?
- 21 MS. WITTHANS (STAFF): You have an annotated
- 22 combination of reports there. After the project plan, the
- 23 first item is the site plan opinion for the first project,
- 24 8-98001, that's page 7.

- VICE CHAIR PERDUE: Okay, there we go, alright I was
- 2 reading the, okay so, remain intact and, provided the
- 3 fundamental findings of the Planning Board remain intact and
- 4 in order to meet the project plan and site plan findings,
- 5 consideration shall be given, blah de blah, okay.
- 6 COMMISSIONER WELLINGTON: But this is the one we had
- 7 the signature set on right, because this is still Phase One,
- 8 the first.
- 9 MS. WITTHANS (STAFF): Bearing in mind the signature
- 10 set changed:
- 11 COMMISSIONER ROBINSON: How did the signature set
- 12 change?
- MS. WITTHANS (STAFF): When this building came in,
- 14 there was a staff level approval of that building, it
- 15 changed the format, the footprint of the building slightly.
- 16 COMMISSIONER ROBINSON: It changed the height or is it
- .17 the same?
- MS. WITTHANS (STAFF): No, we did not change the
- 19 height.
- 20 COMMISSIONER ROBINSON: So it was the same height as
- 21 the previous building?
- MS. WITTHANS (STAFF): The previous building was four
- 23 stories and this, it was configured differently in the first
- 24 site plan, but it was four stories and four stories.

- COMMISSIONER ROBINSON: That's not the question
- 2 there is a height limitation on the signature set in.
- 3 first, for the first building and I want to know if 45ft was
- 4 on the signature set. Now the building that came in the
- 5 First Phase is arguably more than 45ft, then you had the
- 6 amendment and the next building that came in was also more
- 7 than 45ft? I am trying to figure out how you move from
- 8 Building A that's clearly subject to the signature set to
- 9 Building B which may or may not be subject to the signature
- 10 set. I am confused. We have different phases and I don't
- 11 know whether the (overspeaking).
- MS. WITTHANS (STAFF): Both buildings were site plans.
- 13 The site plan approval said four stories, it said nothing
- 14 about 45ft.
- 15 COMMISSIONER ROBINSON: So the second buildings was
- 16 subject to a separate site plan and a different signature
- 17 set.
- 18 MS. WITTHANS: This building is in Phase One. The
- 19 Phase One site plan said four stories. The buildings were
- 20 configured in location and when that building was refigured
- 21 we did what, we just did a new drawing a new sheet for that
- 22 section and it said four stories.
- 23 COMMISSIONER ROBINSON: Okay, I am not quite sure that
- 24 I am communicating, the first site plan is improved, it's
- 25 got a signature set that says 45ft. Second site plan comes

- l in, is there a separate signature set for that second site
- 2 plan, as a matter of normal administrative process. Yes or
- 3 no. Doesn't the apple (overspeaking).
- 4 CHAIRMAN BERLAGE: Let her answer. Let her think.
- 5 Take your time.
- 6 MS. WITTHANS (STAFF): When we prepared the second
- 7 revised signature set for the amendment to the multi-family
- 8 building we looked to what the board saw and approved, which
- 9 was the site plan data table and noted that it was four
- 10 stories. Therefore when the amended Phase One building came
- 11 in we made sure that the information was reconciles
- 12 appropriately and it was four stories.
- 13 COMMISSIONER ROBINSON: Answer my question which is it
- 14 appears that the second site plan and the second signature
- 15 set, neither of them had the 45ft limitation on them, in
- 16 contradiction the first set where there was such a
- 17 limitation. It's a critical distinction.
- 18 CHAIRMAN BERLAGE: Why?
- 19 VICE CHAIR PERDUE: So here's where it seems to me.
- 20 COMMISSIONER BRYANT: Why
- 21 CHAIRMAN BERLAGE: Yeah, why?
- 22 COMMISSIONER ROBINSON: Because the signature set is
- 23 what you go to get building permits for and it's a very
- 24 rigorous regulatory document, it's the one that you sign Mr.
- 25 Chairman that says everything but the board standards.

- 1 CHAIRMAN BERLAGE: If they are different, what follows
- 2 from that.
- 3 COMMISSIONER ROBINSON: What follows from that, if the
- 4 first set of site plans says, implies 45ft and has a
- 5 signature set that says 45ft, that signature set interprets
- 6 the site plan. It's another level of review. You go from
- 7 signature set, excuse me you go from site plan to signature
- 8 set, which is a rigid binding regulatory structured
- 9 document, and the building permits are based on the
- 10 signature set. When you go to get your building permits,
- 11 they don't look at the site plan, they may look at the site
- 12 plan, but what they really look as is the signature set,
- 13 okay. Now the second building comes in, it's got a
- 14 different, we are in another phase, there is a site plan.
- 15 The site plan says four stories, the signature set says four
- 16 stories.
- 17 CHAIRMAN BERLAGE: So you are suggesting that the first
- 18 building is in violation and the others or not.
- 19 COMMISSIONER ROBINSON: The first building is in
- 20 violation and the others are not if you assume that we have
- 21 some authority to interpret the project plan at site plan to
- 22 reflect changes in market forces and things that may have
- 23 been occurring in that particular zone, so.
- VICE CHAIR PERDUE: So, but I am with you, if I am
- 25 following your position, there are a couple of stages, it's

- 1 that the subsequent phases, it's the tail-on signature set
- 2 that's creating, that relieves the ambiguity. There is no
- 3 ambiguity in the signature set, that's not important, but in
- 4 the, where building permits were issued pursuant to
- 5 something that does not have that table in it, then if I am
- 6 understanding you correctly, the argument is there it is
- 7 ambiguous.
- 8 COMMISSIONER ROBINSON: It is ambiguous and I would
- 9 argue furthermore if I were the developer to pursue this
- 10 line of reasoning that if it goes to DPS and they review,
- 11 you see because the building permits have to come here for
- 12 re-review so we get further level of review in the second
- 13 cases. The way the process works, as I understand, the
- 14 signature set is filed. You go to pull your building
- 15 permits, DPS is going to say, they are going to look at it,
- 16 the are all going to ask us also if it complies with the
- 17 signature set, because there is another level review.
- 18 COMMISSIONER BRYANT: They don't understand our side of
- 19 the story.
- 20 COMMISSIONER ROBINSON: That's right, they don't
- 21 understand what we do, we may not understand what we do, so
- 22 because their review is very technical so when you pull the
- 23 building permits there has been a sub solantio finding by
- 24 this staff at this agency and by DPS at that point that
- 25 those building permits comply with the signature set. And

- 1 in the absence of fraud, clear mistake, I think, or I would
- 2 argue if I were the Builders Council, as a matter of law
- 3 they can rely on that because they go out and they start
- 4 pouring concrete and stuff like that. At that point you are
- 5 getting into constitutional barriers about the ability for
- 6 us to change that plan without some compelling reasons. So
- 7 it may have been a mistake as a matter of compatibility, as
- 8 a matter of looking at tall buildings being built right on a
- 9 ridge line where they overshadow a church and there may have
- 10 been a failure on our part to pick up there was a
- 11 compatibility problem, that's, I am just saying what one of
- 12 the witnesses argued that somewhere there is these buildings
- 13 showed up on a ridge line and that really overshadowed the
- 14 church and it overshadowed the Town Center. By the time we
- 15 get to the building permit phase two and three, we may have
- 16 made a mistake in urban design but that error does not rely,
- 17 does not fall on the builder by the time you are pulling the
- 18 building permits, it falls on the board.
- 19 COMMISSIONER WELLINGTON: I would like to address the
- 20 error issue. Yeah the responsibility falls on the board and
- 21 it's our job to protect the integrity of what we approved
- 22 and the question is, you know, is if the 45ft in the project
- 23 plan follows throughout through all the documents, which it
- 24 does, and let's say it's not 45 and not inches, there is
- 25 some discretion, we have buildings that exceeded it, one

- 1 building, building three, exceeded the 45ft by 8ft 8".
- 2 Another one, the range was 3%ft to 6ft 7", certainly 6ft 7"
- 3 is a sizeable amount. Another one was 5ft 10". So, and we
- 4 have the problem with the compatibility and the sitting on
- 5 the hillside looming over the historic district, so the
- 6 question is who bears responsibility for the error. And we
- 7 do, and that's what I said before, the plan that was
- 8 established, we had this requirement in the project plan and
- 9 it carried out through it and the question is what is the
- 10 proper remedy and I think.
- 1) CHAIRMAN BERLAGE: No, I disagree, with all due
- 12 respect, the issue is not who is responsible for the error,
- 13 as I said earlier the issue is has there been a violation of
- 14 the site plan, have the complainant met their burden of
- 15 proof in establishing a violation of the site plan and I
- 16 have rarely seen a civic organization un-represented by
- 17 attorneys do a more impressive job of making their case,
- 18 than I have seen today, but the burden of proof is on them,
- 19 we cannot find a violation of our site plans because there
- 20 was a misunderstanding and because our paper trail was
- 21 ambiguous, there has to be a clear unambiguous violation and
- 22 it's not here.
- 23 COMMISSIONER ROBINSON: There is no violation in my
- 24 opinion in Phases Two and Three, there is clearly no

- l violation. Now there may have been a failure on
- 2 (overspeaking).
- 3 CHAIRMAN BERLAGE: So we are down to one.
- 4 COMMISSIONER ROBINSON: We are down to there may have
- 5 been a failure of public policy, for example a change of 5
- 6 to 8ft over an anticipated, is clearly material, if it's so
- 7 it should have come back to the board, there should have
- 8 been amendment, but there is no violation in Phase Two and
- 9 Three.
- 10 CHAIRMAN BERLAGE: It seems to me but again not a
- 11 violation.
- 12 VICE CHAIR PERDUE: Now we are on Phase One, as to
- 13 Phase One, let me have a specific question. What buildings
- 14 were built pursuant to the signature set that has this table
- 15 in it, or were the buildings, I heard about amendments, I
- 16 can't figure out whether buildings were built pursuant to
- .17 this signature set or whether there is then a subsequent
- 18 signature set.
- MS. WITTHANS (STAFF): Okay members, you can correct me
- 20 if I am wrong but the single family homes on String Town
- 21 Road.
- 22 VICE CHAIR PERDUE: Were built pursuant to this set.
- MS. WITTHANS (STAFF): That's it, virtually everything
- 24 else has been modified to some extent.

- 1 VICE CHAIR PERDUE: So it's the multi-family that is in
- 2 question was not built pursuant to this signature set, it
- 3 was built pursuant to a signature set that did not have
- 4 restrictions in.
- 5 MS. WITTHANS (STAFF): Correct.
- 6 COMMISSIONER WELLINGTON: Then why didn't you produce
- 7 the signature set, where is the signature set?
- 8 MS. WITTHANS (STAFF): The signature set is here, I
- 9 presume the chart from the (inaudible) in your pack is
- 10 (inaudible). Oh why didn't I present it to you, why didn't
- 11 I present it to the board?
- 12 COMMISSIONER WELLINGTON: Well, yes.
- VICE CHAIR PERDUE: You were showing us the ones where
- 14 45ft appeared and not the one pursuant to which
- 15 (overspeaking).

- MS. WITTHANS (STAFF): Just a little history, when
- 2 Phase Two, which is up here came to the Planning Board in
- 3 02, 2002, it was also a time when we were working with the
- 4 applicant on modifications to this, when I presented Phase
- 5 Two to the board and I don't know if, you know I also
- 6 indicated that these buildings had been reviewed by staff
- 7 and were being modified from their original layout, but were
- 8 they presented formally to you for approval, no they were
- 9 still handled as a staff level amendment.
- 10 VICE CHAIR PERDUE: Okay but you've got the signature
- 11 set there for the building.
- MS. WITTHANS (STAFF): I was just handed this.
- 13 VICE CHAIR PERDUE: Phase One, not Phase Two.
- MS. WITTHANS (STAFF): First Phase, Phase 1B and this
- 15 is the building in question, I believe. Correct.
- VICE CHAIR PERDUE: Is there any chart?
- MS. WITTHANS (STAFF): It's the chart that's in your
- 18 hand right there.
- 19 VICE CHAIR PERDUE: So that's the one, in what you
- 20 handed out, this chart that's the third page that has four
- 21 stories written by hand and the height limit, written over
- 22 the height limit, that's what appeared on the signature set,
- 23 that was used to build the buildings in Phase One that are
- 24 incorrect.

MS. WITTHANS (STAFF): That was a staff level 1 2 amendment. COMMISSIONER WELLINGTON: Well, I just want to raise 3 the issue that about this burden question because obviously 4 we police our own development. We can on our own find 5 violations of our site plan requirements. It would be 6 totally absurd to imagine that we would approve something 7 and then we drive by and one of our staff would see that it 8 was not in compliance with our signature set or site plan 9 requirements and we couldn't act on our own to take a look 10 at it so I don't see how this is something where a private 11 citizen has the whole burden, this is in the public interest 12 to make sure that were are in compliance and it's just a 13 straight forward regulatory matter of looking at it. You 14 can raise it, we can raise it, staff can raise it and that's 15 the way it should be, and looking at it the best I can say 16 is that this is an incredibly big mess, I mean I have no 17 clarity now about Phase Two or Phase Three, I now don't know 18 exactly which signature set applies to what and that's not 19 right. I mean how am I supposed to make a decision and how 20 do you expect even the most diligent and learned citizen 21 supposed to make sense of our process. Don't we just keep 22 in a file every amendment and change and why don't we have 23 that. I just, I am at a loss, we have been here since, I 24 don't know how many hours. 25

- 1 CHAIRMAN BERLAGE: Quite a while and anyone would like
- 2 to make a motion may do so.
- 3 COMMISSIONER WELLINGTON: Excuse me.
- 4 COMMISSIONER BRYANT: I will, as soon as my colleague
- 5 finishes making here critical presentation because I am
- 6 sitting here saying there is an inevitability, there is a
- 7 vote to be taken.
- 8 COMMISSIONER WELLINGTON: I am fine with that, I am
- 9 fine, go ahead.
- 10 CHAIRMAN BERLAGE: Ms Krasnow? You wanted to say
- 11 something Rose?
- MS. KRASNOW: I was just going, Rose Krasnow of
- 13 Development Review, I just, in answering Commissioner
- 14 Wellington's question, I think what has struck me as someone
- 15 who has come in long after is the point that Commissioner
- 16 Perdue raised earlier which is that we have been unable to
- 17 ascertain why it went from 45ft to four stories but clearly
- 18 it did and the buildings were built in accordance with the
- 19 four-story regulation. We cannot, it's been silent in the
- 20 records as far we can ascertain.
- 21 COMMISSIONER ROBINSON: At least Phases Two and Three I
- 22 am still unconvinced, it's about Phase One, I am trying to
- 23 figure it out.
- 24 CHAIRMAN BERLAGE: Okay, any motions?

VICE CHAIR PERDUE: I am going to move that we find no 1 violation and my rationale is that I think there is, it is a 2 very messy record but I think as to the place where it gets 3 the clearest is with the signature set that has height 4 limits in it, but none of the buildings in question, at 5 least as I understand it, none of the buildings in question . 6 were built pursuant to that signature set. They were built 7 pursuant to a signature set that explicitly deleted the 8 height limits. They are written out, they are overwritten, 9 and are says four stories and the height limit is crossed 10 out and that's the conditions pursuant to which these 11 buildings were built and therefore I would not find a 12 violation. 13 COMMISSIONER BRYANT: I am going to second the motion 14 and I am going to go a step further by agreeing with my 15 colleague that, yes it's messy, but it's our mess, meaning 16 this is an opportunity for us to take what we learned, or 17 did not learn here today, and then look at the whole idea of 18 how to make sure that our self-policing is done more 19 effectively. But it would have been, from my perspective, a 20 gross injustice based upon the applicants in terms of what 21 they relied upon, not only from us but also from permitting 22 services etc., and then to be saddled with the idea that 23 they are in violation because of the fact that they followed 24 our rules and our guidelines. So it's, as far as I am 25

- 1 concerned, it's not a loss, it's an opportunity for us to
- 2 make a circumstance even better and perhaps preclude this
- 3 kind of situation occurring in the future. But I must agree
- 4 with the Chair, you were outstanding, you the three of you
- 5 were outstanding in terms of your presentation and I know
- 6 that doesn't make you feel any better in terms of my
- 7 seconding the motion, but in terms of how you presented your
- 8 arguments and in terms of the depth of detail that you went,
- 9 it was very, very impressive but in spite of how impressive
- 10 it was I can't find that there is an intentional violation
- 11 of height.
- 12 CHAIRMAN BERLAGE: Any further discussion? No, I am
- 13 afraid not.
- 14 COMMISSIONER WELLINGTON: No, I will not support the
- 15 motion. I actually disagree with the finding that there was
- 16 a change in the signature set and I can't make that finding.
- 17 This record is not at all clear, I think it inappropriate
- 18 for this agency to rely on its own failure to keep its own
- 19 records to establish ambiguity. I mean the ambiguity is
- 20 because we don't have the documents that we were supposed to
- 21 have to know what we approved and what we didn't approve
- 22 including the drawings and the actual laying out of the
- 23 buildings. It could have been that way, might not have
- 24 been. What I have is the original project plan approval

- 1 that said 45ft and then a lot of humming, and the lack of
- 2 clarity so for that reason I cannot support the motion.
- 3 COMMISSIONER ROBINSON: Well, I will support the motion
- 4 with a couple of observations. First there is a fundamental
- 5 question about our regulatory authority, which is can we
- 6 make modifications at site plans of standards, guidance or
- 7 limitations that might be contained in a project plan. I
- 8 have talked to counsel about that, I think if we do it
- 9 through hearing and on the record that we can do that as
- 10 long as the ultimate findings are compatible with the
- 11 general purposes of the project plan and with the zone. So
- 12 to the extent that there were modifications and the height
- 13 contained in the project plan through to site plan process,
- 14 that was lawful, that we have a bad record, about how that
- 15 happened, and that's embarrassing, particularly embarrassing
- 16 if you specialize in administrative law, but that's not a
- 17 violation that's a failure of the agency's processes.
- 18 Furthermore I will note that the extent that the buildings
- 19 were oversized, the townhouses are oversized, the apartment
- 20 buildings are oversized, they are oversized proportionately
- 21 so the extent that everything went up roughly by about 10 to
- 22 12% so that's material change, they all got larger, they
- 23 shouldn't have gotten larger, so at least as a ratio among
- 24 the buildings is consistent. Now that doesn't help very
- 25 much for accountability with the Sector Plan Town Center but

we've moved beyond that in terms of the actual approvals 1 that we appear to have granted. The basic problem is, is 2 there enough here to find that the applicants violated the 3 site plan? Now, normally the site plan requirements and the 4 signature set requirements are absolute, I am not saying 5 that there is a matter, that they have to be signed, they 6 could do it inadvertently and still be in violation, they 7 don't have to have intent to violate it, but I think given 8 the ambiguity of the record and the ambiguity of the 9 agency's action, it's very harsh and I think inappropriate 10 to hold the developer to essentially a standard of absolute 11 regulatory liability when we didn't provide them the 12 guidance. So I don't like where we have come out as a 13 matter of result and the impact on the community but that's 14 not the issue before us. The impact on the community is 15 what it is, it's clearly in some cases been damaging, but 16 the issues here is a violation, I don't think we have enough 17 here to find a violation, so I will support the motion. 18 CHAIRMAN BERLAGE: And I will support the motion as 19 well on the same ground that the burden of proof is on the 20 complainant to establish a violation and this record is at 21 best ambiguous, but I do want to thank the community for all 22 the work that they put into this and for sending us a major 23 wakeup call because we do need to review our procedures and 24 in Montgomery County because we like to control everything,

25

- 1 and we are very good at that, we end up with volumes of
- 2 paper, but sometimes the illusion of control is generated by
- 3 large volumes of paper but if they are not put together
- 4 consistenty and logically, you end up with situations like
- 5 the one we had before us today and we need to fix this
- 6 quickly because we are going to be doing more and more
- 7 mixed-use development, more and more zones of this variety,
- 8 we are creating zones like this with every master plan, we
- 9 are talking about foreign based zoning, we are talking about
- 10 revising the master plan process to provide more flexibility
- 11 especially in our metro-station areas, so if we don't do it
- 12 right, what we have seen today can happen again and again
- 13 and that must be prevented, so thank you for the work that
- 14 you put into this effort, but I will support the motion.
- 15 The motion is to adopt the Staff Recommendation that is a
- 16 finding of no violation, all in favour please say I.
- 17 Opposed?
- 18 COMMISSIONER WELLINGTON: Nay.
- 19 CHAIRMAN BERLAGE: And the chair votes I. By a vote of
- 20 four to one the motion carries, and we are adjourned. Thank
- 21 you.

CERTIFICATION This is to certify that the attached proceedings before the Maryland-National Capital Park and Planning Commission, Montgomery County Planning Board, in the matter of Site Plan Reviews No. 8-98001, 8-98001B, and 8-9802014, Clarksburg Town Center Violation Hearing, held in the auditorium at 8787 Georgia Avenue, Silver Spring, Maryland, on Thursday, April 14, 2005, were held as herein appears, and that this is a transcript from the audiotape. Technical Writer

LINOWES | BLOCHER LLP

ATTORNEYS AT LAMS J 21 图 3-14

July 19, 2005

Todd D. Brown 301.961.5218 tbrown@linowes-law.com



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MF

S LO R W K L

By Overnight Delivery

Michele Rosenfeld, Esq. Legal Department Maryland-National Capital Park and Planning Commission 8787 Georgia Avenue Silver Spring, Maryland 20910

Re:

Clarksburg Town Center

Dear Ms. Rosenfeld:

On behalf of NNPII-Clarksburg LLC and Newland Communities, LLC, the developer and project manager of the Clarksburg Town Center, respectively (collectively, "Newland Communities"), this letter responds to the letter to you dated July 13, 2005 from Norman Knopf on behalf of his client the Clarksburg Town Center Advisory Committee. Please include this letter in the public record.

Newland objects to the continued unsupported assertions by Mr. Knopf of "other violations" at Clarksburg Town Center. As we indicated at the July 7, 2005 hearing before the Planning Board, Newland Communities welcomes the opportunity to address any specific allegation of violation made in connection with the project. However, other than the reference to "O" Street, Mr. Knopf's letter does not include any specifics as to what his client contends may be in violation of existing approvals. With respect to the "O" Street reference, as we advised the Board at the July 7, 2005 hearing, the substitution of a public street for a pedestrian mews between the Town Square and the Clarksburg church is shown on an approved amendment to the Site Plan signature set (Phase IA-1), a copy of which has been provided to your office. Although our investigation is not complete, we further note with significance that although the initial and subsequently amended site plan did show a pedestrian mews, the original approved Project Plan clearly shows a street in this location.

Newland Communities also opposes the request for further hearings on July 28, 2005 on the alleged other violations. For Newland Communities to respond to such allegations, Mr. Knopf's clients must first provide more than a general assertion of violation. Newland Communities and its counsel must be given sufficient time to review files concerning what in some instances may



Michele Rosenfeld, Esq. July 19, 2005 Page 2

involve matters addressed several years ago when the project was under different ownership with different engineering consultants. We would also expect sufficient time to be provided to discuss the specific allegations with those individuals who represented the developer during the relevant timeframe and any County staff that might also be familiar with the facts.

Considering the pending applications for the Clarksburg Town Center Project Plan Amendment, Phase IA-4 Site Plan Amendment and Phase III Site Plan (scheduled to be considered in September and October), there will be opportunity in the coming months for the Planning Board to consider any specific allegation raised that Planning Staff, after complete investigation, may consider to have merit. We therefore oppose the request to hold additional hearings on July 28th. Additional hearing(s), if any, should not be scheduled until such specifics are properly alleged and adequate time is provided for all interested parties to investigate the matter thoroughly.

Very truly yours,

LINOWES AND BLOCHER LLP

Todd D. Brown

cc: Planning Board Members (by overnight delivery)

County Council Members

Mr. Charles Loehr

Ms. Rose Krasnow

Mr. Michael Ma

Mr. Richard Croteau

Robert Brewer, Esq.

Timothy Dugan, Esq.

Kevin Kennedy, Esq.

Norman Knopf, Esq.

Barbara Sears, Esq.

Stephen Z. Kaufman, Esq.

Montgomery County Planning Board

Montgomery Regional Office Auditorium 8787 Georgia Avenue, Silver Spring, Maryland 20910

Site Plan Review No. 8-98001G Phase I and 8-02014B, Clarksburg Town Center

Thursday, February 10, 2005

Thank you for testifying on Preliminary Plan no. 1-95042 Clarksburg Town Center. The times allowed for testimony on this item are listed below with the speakers' names.

The timer includes a green, yellow and red light. At the yellow light you have one minute remaining. At the red light, please finish your thought.

We encourage coordinated testimony and appreciate having one or two spokespersons for a group. Time used for questions by Board members will not be deducted from your time.

Written testimony is also appreciated and will be read by each Board member. If you turn in written testimony, please provide 10 copies. Thank you for your interest and cooperation.

Name	Representing	
Barbara Sears, Esq.		
Clark Wagner, Esq.		
Les Powell		
Judith M. Koenick		
Kim Shiley		
Carol Smith		
Amy Presley		

Montgomery County Planning Board

Montgomery Regional Office Auditorium 8787 Georgia Avenue, Silver Spring, Maryland 20910

Clarksburg Town Center

Thursday, April 14, 2005

Thank you for testifying on Clarksburg Town Center. The times allowed for testimony on this item are listed below with the speakers' names.

The timer includes a green, yellow and red light. At the yellow light you have one minute remaining. At the red light, please finish your thought.

We encourage coordinated testimony and appreciate having one or two spokespersons for a group. Time used for questions by Board members will not be deducted from your time.

Written testimony is also appreciated and will be read by each Board member. If you turn in written testimony, please provide 10 copies. Thank you for your interest and cooperation.

Name	Representing	
Amy Presley		
Carol Smith		
Tim Dugan		
Todd Brown		•
Barbara Sears		
Niran Nagda		
Jaya Nagda		
Esther King		
Lynn Fantle		
Tim DeArros		
Kiandokht Afshar		
Steven Burns		
Kathie Hulley		
Paul E. Majewski		,